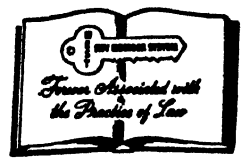
MISSOURI DIGEST

VOLUME 13

EXCHANGE OF PROPERTY—EXECUTORS AND ADMINISTRATORS

COVERING CASES FROM

STATE AND FEDERAL COURTS



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Reference

MISSOURI DIGEST

The MISSOURI DIGEST, a modern KEY NUMBER DIGEST, combines all the research and time-saving features developed by the Publisher's Editorial Staff in the more than a half century of specialization in the preparation and publication of Digest Services for the Bench and Bar.

The case law is arranged under the popular WEST KEY NUMBER system which is universally accepted by Judges, Lawyers and Teachers as the standard classification of American Law.

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The original volume 13 was published in 1930. Since that time there has been ever-increasing litigation developing new principles of law, or requiring the application of established legal principles to changed economic and social conditions. To improve the utility of the MISSOURI DIGEST and, at the same time, to make practical and economical provision for future growth, the topics within the scope of the original volume are published in these two convenient volumes—

13. Exchange of Property—Executors and Administrators

13A. Exemptions—Fraud

This new volume will, of course, be constantly kept to date as an integral part of the MISSOURI DIGEST through the established Cumulative Supplementary Service.

THE PUBLISHER

December, 1953

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ABBREVIATIONS OF COURTS

United States Supreme Court	**U.S.Mo.**
United States Court of Appeals	**C.A.Mo.**
United States Circuit Court of Appeals	**C.C.A.Mo.**
United States Circuit Court	**C.C.Mo.**
United States District Court	**D.C.Mo.**
Supreme Court of Missouri	**Mo.**
Court of Appeals of Missouri	**Mo.App.**

OUTLINE OF THE LAW

Digest Topics arranged for your convenience by Seven Main Divisions of Law
For complete alphabetical list of Digest Topics, see Page XIII

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3. CONTRACTS
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EXCHANGE OF PROPERTY

Scope-Note.

INCLUDES mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto.

Matters not in this topic, treated elsewhere, see Descriptive-Word Index.

Analysis.

⚭1. Nature and elements in general.
2. Exchange of real property.
3. —— Requisites and validity.
(1). In general.
(2). Estoppel or waiver.
4. —— Construction of contract.
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9. Exchange of personal property.
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11. —— Rescission.
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13. —— Remedies.
(1). In general.
(2). Conditions precedent.
(3). Evidence.
(4). Trial.
(5). Damages.
14. —— Conditional exchange.

⚭1. Nature and elements in general.

Mo.App. 1892. An owner delivered a quantity of wheat to a milling company. The company was subsequently to pay for the wheat in flour on demand. The wheat was deposited in a sink, from whence it was elevated to be ground into flour. It was mixed with other wheat and placed in the sink. The wheat was entered on the mill books to be paid for in flour. *Held*, that the transaction was an agreement for an exchange of goods, and not for a sale, nor a bailment.

Martin v. Ashland Mill Co., 49 Mo.App. 23.

Mo.App. 1894. In an action for damages based on alleged fraud and deceit practiced by defendant in an exchange of property, it appeared that plaintiff had possession of the house and lot given by him in exchange, and that his only evidence of title was a warranty deed from the former owner, which, though in other respects complete in form and duly executed, was left blank as to the name of the grantee, and that the deed in this condition was turned over by plaintiff to defendant. It further appeared that defendant went into the possession of the house and lot, and enjoyed the rents and profits, and that plaintiff, at de-

For later cases see same Topic and Key Number in Pocket Parts

fendant's request, paid off some back taxes on the property. *Held* that, as defendant might at any time have called upon plaintiff to fill in the name of the grantee, defendant could not contend that plaintiff had parted with nothing of value.

Otis v. Browning, 59 Mo.App. 326.

⚖2. Exchange of real property.

⚖3. —— Requisites and validity.

⚖3 (1). In general.

Mo. 1902. Where a tract of land worth $1,600 is exchanged for a tract worth $1,000, there is no such discrepancy in their value as to authorize a cancellation of the transaction, though the owner of the latter tract had purchased it for a less sum for purposes of speculation.

Wilson v. Jackson, 66 S.W. 972, 167 Mo. 135.

Mo. 1913. Where, by reason of the nullity of defendant's deed, delivered pursuant to an agreement to exchange property, he received 160 acres and eight city lots for $100 in cash, the inadequacy of the consideration was so shocking as to entitle plaintiff to rescind.

Schroeder v. Turpin, 161 S.W. 716, 253 Mo. 258.

Mo. 1914. Misrepresentations as to land which defendants induced plaintiffs to take in exchange for their farm *held* to constitute a fraud entitling plaintiffs to a cancellation of the contract.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

Where defendants sought to effect an exchange of land with plaintiffs, and, upon plaintiffs' statement that they would accept the judgment of third persons, showed such persons a different tract of land from the one actually conveyed, misrepresentations by the third persons induced by defendants' fraud will be considered as defendants' misrepresentations, warranting a cancellation of the conveyance.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

Where the owners of a one-half interest in lands knowing of the misrepresentations of their co-owners, or at least knowing of the great disparity in the value between their lands and those of plaintiff, join in an exchange of lands, they are liable for all of the misrepresentations of their co-owners.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

The equitable owner of part of land, the legal title to which was in his son, is liable for misrepresentations made by his son and the other co-owner in effecting an exchange of the property, where it appeared that he could not have been ignorant of the facts.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

Mo. 1916. The invalidity of a land exchange contract, caused by fraudulent representations by one of the parties as to freedom of land from overflows, was not affected by the fact that the induced party examined the land at the time.

Wilson v. Henderson, 191 S.W. 72, 77.

Mo. 1920. That plaintiff's son had examined the parcel of land, which plaintiffs were induced to accept in exchange for other land, does not preclude cancellation of the contract on the ground of misrepresentations as to the value of the land, etc., for mere inspection does not preclude a buyer from relying on a seller's representation as to matters which would deceive him, etc.

Vodicka v. Sette, 223 S.W. 578.

Such inspection would not prevent cancellation of contract because of misrepresentation as to market value; such representation being one of fact.

Vodicka v. Sette, 223 S.W. 578.

Mo. 1924. One who had owned and lived on farm a few miles from another, and had examined latter to extent desired before contracting to take it at agreed price in exchange of property, *held* not entitled to cancel contract on ground that he was misled by statement as to its value or quality, or statement, not shown to be false, as to amount plowed.

Kirby v. Balke, 266 S.W. 704, 306 Mo. 109.

Mo. 1926. Where parties are not on equal footing, statements as to value of property, if false and fraudulent, may invalidate trade.

Parish v. Casner, 282 S.W. 392.

Mere presence of opportunity to investigate real value of property does not necessarily preclude right to rely on representations of other party to exchange.

Parish v. Casner, 282 S.W. 392.

Inexperienced farmer, exchanging land with experienced business man for mortgage liens, *held* not precluded from relying on latter's statements of value because visiting town in which mortgaged lands were for few hours in company with defendant and his agent.

Parish v. Casner, 282 S.W. 392.

Misrepresentations that mortgages given in exchange for land were purchase money

For references to other topics, see Descriptive-Word Index

mortgages, rather than accommodation transactions, *held* material.
Parish v. Casner, 282 S.W. 392.

Representations that mortgages were first mortgages where in fact general and special tax liens existed against land, *held* basis for charge of fraud, notwithstanding real facts appeared on public records.
Parish v. Casner, 282 S.W. 392.

Mo. 1928. Party may contract for exchange of real property in name of another.
Fuchs v. Leahy, 9 S.W.2d 897, 321 Mo. 47.

Mo.App. 1913. Where one of three owners of land made representations as to its value as a positive fact, and called in one of the other owners who had seen the land, the statement of the owner, who made the representations, that he had never seen it does not make them mere expressions of opinion.
Manning v. McClure, 154 S.W. 803, 168 Mo.App. 533.

Where defendants, by fraudulent misrepresentations, induced plaintiff to exchange a stock of goods for land, plaintiff cannot be denied a rescission because, for convenience, he gave in his own name a deed of trust to secure money owed by defendants and signed the note secured by that instrument.
Manning v. McClure, 154 S.W. 803, 168 Mo.App. 533.

Mo.App. 1929. Defendant's agreement to convey land in return for standing timber on plaintiff's lands constituted sufficient consideration to sustain contract, though coupled with inadequate consideration.
Bay v. Bedwell, 21 S.W.2d 203.

Mo.App. 1930. Representations as to patent conditions of property are not actionable fraud, where plaintiff made own inspection; doctrine of caveat emptor applying.
Chapman v. Kraehe, 22 S.W.2d 845.

Defendant's concealment of condemnation order as to building on property for defects not patent on inspection *held* actionable.
Chapman v. Kraehe, 22 S.W.2d 845.

⇐8 (2). Estoppel or waiver.

Mo. 1912. Plaintiffs *held* not estopped to sue to cancel a contract to exchange land.
McPherson v. Kissee, 144 S.W. 410, 239 Mo. 664.

Mo. 1913. Where defendant's deed to land, delivered to plaintiff pursuant to an agreement for an exchange of property, in fact conveyed nothing, plaintiff's attempt to convey the land to a third person did not estop him to assert his right to rescind.
Schroeder v. Turpin, 161 S.W. 716, 253 Mo. 258.

Mo. 1925. Plaintiff *held* not entitled to relief for fraud in exchange of properties, where he continued to participate in transaction after alleged fraud.
Stockton v. Minkin, 276 S.W. 374.

Mo. 1926. One party to exchange, acting under moral duress when renting farm exchanged, and renewing and extending purported notes, secured by mortgage liens, given him in exchange for farm, *held* not to have waived or condoned fraud inducing exchange.
Parish v. Casner, 282 S.W. 392.

Mo. 1926. Defendant, in suit to try title, alleging fraud in trading land, *held* to have ratified contract under which he traded.
Stover v. Snow, 287 S.W. 1042, 315 Mo. 1046.

Mo.App. 1930. Acceptance of benefits or exercise of dominion over property acquired, after discovery of fraud, may evidence affirmance and preclude recourse to equity.
Chapman v. Kraehe, 22 S.W.2d 845.

Equivocal acts not clearly evincing purpose to retain property with knowledge of fraud will not defeat rescission of exchange.
Chapman v. Kraehe, 22 S.W.2d 845.

Plaintiff's collection of rent, payment of taxes keeping property insured, and meeting obligations on notes, and offer to sell pending suit, did not preclude relief for fraud inducing exchange.
Chapman v. Kraehe, 22 S.W.2d 845.

⇐4. —— Construction of contract.

Mo. 1914. A provision of a contract to exchange lands, which required each party to furnish the other with an abstract showing clear title, with deeds, as soon as the abstracts could be brought down to date, required each party to do these things within a reasonable time.
Ranck v. Wickwire, 164 S.W. 460, 255 Mo. 42.

Time is of the essence of a contract to exchange realty, and to furnish the respective parties with abstracts showing clear title, as soon as the same can be brought down to date.
Ranck v. Wickwire, 164 S.W. 460, 255 Mo. 42.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1924. Time *held* not of essence of contract for exchange of realty, which provided that abstract should be delivered within three days after date of contract, but contained no provision making it void for breach of any stipulation except the failure of either party to rectify a defect of his title within 30 days after notice.

Richards v. Johnson 261 S.W. 53.

Mo. 1936. Exchange agreement whereby defendant agreed to lend plaintiff $40 per acre on farms for 10 years and to lend $32 per acre for 25 years to bona fide purchasers and release plaintiff from liability on transfer of property, providing that plaintiff was to deposit bonds with defendant as additional security, and that 20 per cent. of first mortgage be paid defendant in cash as consideration for making longer loan and releasing plaintiff, entitled plaintiff to return of bonds, on sale of all farms to bona fide purchasers, only if plaintiff reduced loans to $32 per acre and paid defendant $8 per acre.

McCanles Bldg. Co. v. Missouri State Life Ins. Co., 93 S.W.2d 917, 338 Mo. 1071.

Mo. 1947. One refusing to perform his part of contract to exchange land owned by him for land in which other party had interest under contract to purchase it from fee simple owner, when advised by such owner of previously recorded trust deed against such interest, acquired no title to land under contract provision that he should receive fee simple title thereto, subject only to his purchase money trust deed to other party's vendor.

Lewis v. Gray, 201 S.W.2d 148, 356 Mo. 115.

Mo.App. 1906. While, in contracts for the sale of land, the execution and acceptance of a deed is usually the final conclusive evidence of the contract of the parties, and extinguishes all prior verbal or written agreements, yet, where the contract embraces not only the sale of land, but also payment for the land by a stock of goods, and requires the vendee of the land to assist in invoicing the stock and surrender its possession to the vendor before the conveyance of the land, and to thus place himself in the position of a creditor of the vendor to the extent of the excess in value of the goods over the land, the execution and delivery of a deed by the vendor in pursuance of the contract does not extinguish the contract, in the absence of special covenants or agreements in the deed changing or abrogating those of the contract.

Wilson v. Wilson, 92 S.W. 145, 115 Mo. App. 641.

An agent's commission for services in negotiating a loan, the payment of which is secured by a deed of trust distinct from that securing the loan, is not, although it is computed on the basis of an annual charge of 2 per cent. on the amount of the loan, to be construed as representing interest on the loan itself, within the meaning of a clause of a contract for the exchange of the land for a stock of goods, which requires the vendee who assumes the incumbrance incurred by reason of the loan to pay interest on the loan after he is given possession of the land.

Wilson v. Wilson, 92 S.W. 145, 115 Mo. App. 641.

Mo.App. 1919. Where defendant, party to exchange of lands, wrote at bottom of contract, "I accept the above property," he did not thereby accept notes and a mortgage securing them given by plaintiff as cash consideration, clause covering such notes and mortgage not being in contract at time, notes not having been given until defendant stated he would not accept plaintiff's land without additional consideration.

Ozias v. Paustian, 209 S.W. 587.

⇐5. —— Modification or rescission.

Mo. 1908. A breach of a promise by one party to a contract for exchange of property, that the other party should have a certain position at a stated salary, was not ground for rescission of the contract.

Younger v. Hoge, 111 S.W. 20, 211 Mo. 444, 18 L.R.A.,N.S., 94.

Mo. 1913. Where defendant's deed to plaintiff pursuant to an agreement for an exchange of property conveyed nothing, plaintiff was entitled to rescind.

Schroeder v. Turpin, 161 S.W. 716, 253 Mo. 258.

Mo. 1914. Where, in effecting an exchange of land, part of plaintiff's property was conveyed to the wife of the principal defendant, she cannot set up her freedom from fraud to defeat plaintiff's right to set the exchange aside on that ground; it appearing that she paid nothing for the land, and took it subject to all the equities.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

Mo. 1916. Where in land exchange transaction the contract was made June 4th to be consummated September 15th upon delivery of abstracts, etc., a rescission thereof on August 15th, before abstracts had been delivered, was sufficiently prompt.

Wilson v. Henderson, 191 S.W. 72, 77.

For references to other topics, see Descriptive-Word Index

The rule requiring rescinding party to tender back that which he has received, or restore the status quo, could not be invoked as a defense in a case where after rescission the party notified of rescission himself procured the exchanging deeds, left in escrow with his agents, to be recorded.

Wilson v. Henderson, 191 S.W. 72, 77.

Mo. 1917. In action to set aside deed and bill of sale, *held* that where defendant by paying his own debt might secure return of note, he could not defeat rescission on ground that, plaintiff, having hypothecated it, was unable to place him in statu quo.

Johnson v. Jines, 193 S.W. 15.

Rescission of exchange of property will not be denied on ground that defendant could not be placed in statu quo, where property which had passed out of plaintiff's control was of no value.

Johnson v. Jines, 193 S.W. 15.

Though chattel mortgage on part of property received by plaintiff was foreclosed after he notified defendant of his rescission, *held* that rescission would not be denied on ground that defendant could not be placed in statu quo.

Johnson v. Jines, 193 S.W. 15.

That one seeking rescission of contract of exchange was, because of his adversary's fraud, unable to tender back all the consideration received will not, in court of equity, defeat right to rescind.

Johnson v. Jines, 193 S.W. 15.

Mo. 1920. Where plaintiff was induced by reason of false representations of broker to exchange land, and after the exchange paid the broker a commission for securing a loan to carry out the contract, etc., *held*, that plaintiff could not recover from defendant the amount of such commissions, though the broker did not fulfill his promise.

Vodicka v. Sette, 223 S.W. 578.

Mo. 1926. Tender back by one party to land exchange desiring to rescind is not necessary as to property which the other party has made it impossible to return.

Parish v. Casner, 282 S.W. 392.

Mo. 1934. Partial failure of consideration affords no ground for disaffirming executed portions of contract for exchange of properties.

Shannon v. Crabtree 71 S.W.2d 709.

Mo.App. 1906. Where a contract for the exchange of land for a stock of goods required the vendor of the land to furnish a clear abstract of title, "except an incumbrance of $4,000," a provision of the deed, executed pursuant to the contract, that the sale was made "subject to an incumbrance of $4,000 and unpaid commission on such loan," did not modify the contract so as to impose upon the grantee the obligation of paying the commission on the loan.

Wilson v. Wilson, 92 S.W. 145, 115 Mo. App. 641.

Where a contract for the exchange of land for a stock of goods required the vendor of the land to furnish a clear title, with the exception of a stated incumbrance, a clause of the deed executed pursuant to the contract requiring the grantee to assume payment of an additional incumbrance to that stated would be without consideration.

Wilson v. Wilson, 92 S.W. 145, 115 Mo. App. 641.

Mo.App. 1909. Where a contract for the exchange of certain land for merchandise provided that it was subject to the inspection and approval of the merchandise by the landowner, a subsequent modification indorsed thereon extending the date for the taking of the invoice of the goods, and providing that if it exceeded $7,500, the landowner should select goods to that amount, and the other party should reserve the balance, and that otherwise the agreement should remain as written, did not discharge a condition that the whole contract was subject to inspection and approval of the merchandise by the landowner.

Slaughter v. Elliott, 119 S.W. 481, 138 Mo.App. 692.

Mo.App. 1909. Where a person is defrauded in an exchange of property, he may rescind on tendering return of the property or its equivalent, or he may stand on his contract and recover damages.

Baker v. Robertson, 119 S.W. 987, 138 Mo.App. 163.

Mo.App. 1911. Where the same agent represented both parties without the knowledge of one of them, in effecting an exchange of real estate that party was entitled to a rescission upon offering to do equity by tendering to the other party a deed to the property conveyed to her, and offering to account for the rents, by offsetting the reasonable rental of the one property against the other.

Neuman v. Friedman, 136 S.W. 251, 156 Mo.App. 142.

Mo.App. 1913. Where defendants, by fraudulent misrepresentations, induced plaintiff to trade a stock of goods for land, and plaintiff rescinded the contract, a tender of a reconveyance was unnecessary where

the defendants had refused to receive the land from plaintiff under any circumstances.

Manning v. McClure, 154 S.W. 803, 168 Mo.App. 533.

Mo.App. 1929. Plaintiff conveying to third party property received under contract for exchange, after discovery of defendants' fraudulent representations, was barred from securing equitable relief.

Ebel v. Roller, 21 S.W.2d 214.

Mo.App. 1931. Promisees, not showing special damages from promisor's failure to establish store in community as orally agreed, could not rescind contract exchanging promisees' store building for promisors' lands.

Douthitt v. Chenoweth, 34 S.W.2d 556.

⇐6. —— Performance of contract.

Mo. 1914. Where the contract to exchange realty provided that the parties should deliver deeds to the respective lands at the time they exchanged abstracts, plaintiff should have at that time tendered his deed to defendant, instead of sending it to a third person, and only tendering it to defendant when an action for specific performance was brought.

Ranck v. Wickwire, 164 S.W. 460, 255 Mo. 42.

Mo. 1917. That abstractor's signature to abstracts of title was illegible was no ground for party to exchange of realty to refuse to perform his contract.

McGinness v. Brodrick, 192 S.W. 420.

Where contract merely required that abstractor should be reliable, fact that he was not bonded was not ground for party's refusal to perform.

McGinness v. Brodrick, 192 S.W. 420.

Where contract did not state there was mortgage on plaintiff's land, but merely provided defendant should take it subject to mortgage, fact that abstract offered defendant by plaintiff did not show a mortgage on plaintiff's land was no ground for defendant's failure to perform.

McGinness v. Brodrick, 192 S.W. 420.

Where contract did not state that title to plaintiff's land was in her, but provided that abstract should show good title in record owner, fact that plaintiff had only contract for title, having written contract with third party for its purchase, was not ground for defendant's refusal to perform.

McGinness v. Brodrick, 192 S.W. 420.

Mo. 1928. Party contracting to exchange property doing rightful acts, though waiving right to timely abstract, did not waive right to have it examined and defects rectified as provided.

Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639.

Mo.App. 1909. One contracting for the exchange of real estate cannot excuse his breach of the contract on the ground of his wife refusing to join in the deed.

Bird v. Blackwell, 115 S.W. 487, 135 Mo.App. 23.

Mo.App. 1913. Where a purchaser of land by way of exchange was to receive an abstract of perfect title, he is warranted in refusing to consummate the sale, where the abstract showed a large sum in special tax bills against the property, and the vendor's agent merely told him on the day for closing the sale that they had been paid.

Greene v. Musson, 155 S.W. 849, 169 Mo.App. 680.

Mo.App. 1915. A contract for the exchange of plaintiff's picture show for defendants' land, by which plaintiff was to receive a good unincumbered title, entitles him to a title reasonably free from fault which would affect the value or security of possession.

Devero v. Sparks, 176 S.W. 1056, 189 Mo.App. 500.

Mo.App. 1918. Although, under contract for exchange of an automobile for realty, plaintiff was to furnish an abstract showing not only a good merchantable title, but one pronounced such by defendant's attorney, it must be carried out in good faith by both parties, and defendant could not select an attorney who arbitrarily called plaintiff's title defective.

Poplin v. Brown, 205 S.W. 411, 200 Mo. App. 255.

⇐7. —— Rights and liabilities of parties.

Mo. 1928. Vendor accepting notes and trust deed from nominal vendee under common agent's misrepresentations as to his solvency *held* not entitled to establish liability of real vendee for amount of notes.

Fuchs v. Leahy, 9 S.W.2d 897, 321 Mo. 47.

Mo. 1949. Where option contract for the purchase of improved realty called for 2,000 acres of land in exchange or a specified sum of cash under an escrow arrangement, and purchaser erroneously included an additional 160 acres in the escrow, he was entitled to a return of the excess acreage or the value thereof as fixed by escrow agreement.

White v. Boyle Trust & Inv. Co., 217 S. W.2d 366, 358 Mo. 818.

For references to other topics, see Descriptive-Word Index

Mo.App. 1919. Under contract whereby defendant traded a farm for a note of a third person secured by a mortgage and chattel mortgage, each valued at the amount of the face of the note, with provision that plaintiff is to have the interest on the note to a certain date, defendant, collecting by foreclosure less than the face of the note, after payment of taxes, costs, and attorney's fees, is not liable to plaintiff for the interest reserved.

Swartz v. Hiler, 207 S.W. 258.

Mo.App. 1929. Defendant's failure to pay plaintiff for standing timber by conveying land as agreed would give plaintiff right to damages for breach of contract.

Bay v. Bedwell, 21 S.W.2d 203.

⇐8. —— Remedies.

⇐8(1). In general.

Mo. 1905. In a suit for rescission of a contract for the exchange of land, where plaintiff's evidence shows him entitled to rescission, the defendant's claim for specific performance is necessarily eliminated from the case.

Bales v. Roberts, 87 S.W. 914, 189 Mo. 49.

Where the contract sued on at the time of instituting suit to all substantial interests and purposes remained wholly executory, any question of part performance interfering with the granting of relief to plaintiff was also eliminated from the case.

Bales v. Roberts, 87 S.W. 914, 189 Mo. 49.

Mo. 1913. In a suit to rescind an exchange of property, defendant having been permitted to retain certain city lots concededly worth $240, plaintiff *held* not barred from relief because he failed to tender $100 cash and certain worthless oil stock received.

Schroeder v. Turpin, 161 S.W. 716, 253 Mo. 258.

Mo. 1917. Where defendant, by fraudulent representations which plaintiff relied upon, induced her to exchange her land for his, and she, within reasonable time after discovery of fraud, offered to rescind transaction, but defendant refused, plaintiff is entitled to decree investing her with title to land she had conveyed.

Woolum v. Tarpley, 196 S.W. 1127.

Mo. 1918. Where defendant, after using forged abstract to acquire title to plaintiff's land, stands mute without attempt to justify his conduct or show that plaintiff obtained merchantable title to land received in exchange, plaintiff need not show that title to land received by him failed by reason of forgery.

Huggins v. Davidson, 202 S.W. 395, 274 Mo. 34.

Mo. 1919. Petition to rescind exchange of farms for fraud, expressly stating that one of the frauds alleged was not discovered until within 30 days before suit by plaintiff, who could not read or understand English, did not show laches.

Wissman v. Cornbelt Inv. Co., 209 S.W. 865.

Mo. 1919. Where suit in equity by party to an exchange of property to secure money judgment against other party for fraud and to cancel a note, made a charge on the property transferred to complainant, and owned by such other party but held by a bank as collateral, must fail because of want of equity as against such party, it must fail also as to the bank, as its liability depends on establishing cause of action against such party.

Torbit v. Warner, 217 S.W. 40.

Mo. 1926. Refusal to allow interest on advancements by one party to exchange to the other to allow latter to get clear title that he might be defrauded of his land *held* not error.

Parish v. Casner, 282 S.W. 392.

Mo.App. 1911. Where defendant contracted to exchange 80 acres of his land for 40 acres of the land of plaintiff, who requested defendant to execute the deed to plaintiff's wife, and defendant, with intent to defraud, conveyed to the wife another tract, the wife could affirm the exchange and retain the land, even against the objection of plaintiff, though on the discovery of the fraud plaintiff and his wife could rescind, and tender back the property received, and sue for the damages.

Tucker v. Lindley, 140 S.W. 637, 159 Mo. App. 156.

Mo.App. 1918. Where one party to a contract of sale and exchange of farms repudiates and rescinds it, the other may sue for damages without tendering a deed in performance of his part of it.

Nance v. Sexton, 203 S.W. 649, 199 Mo. App. 461.

Mo.App. 1922. A provision in a contract for exchange of property, requiring an appraisement of the property to be taken in exchange if the parties could not agree as to its value, is not for an arbitration in the strict sense, and the award of the appraisers does not have the effect of extinguishing the contract.

Holt v. Williams, 240 S.W. 864, 210 Mo. App. 470.

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Mo.App. 1927. Evidence of fraudulent misrepresentation as to value of coal business *held* insufficient for jury.
Tighe v. Locke, 299 S.W. 105.

Mo.App. 1929. Jury erred in permitting plaintiff to recover money in addition to land in suit on quantum meruit for value of standing timber sold defendant, who agreed to convey land to plaintiff.
Bay v. Bedwell, 21 S.W.2d 203.

Mo.App. 1931. Where consideration for transfer of building was parol promise to open store therein, and also agreement to convey lands, action for damages, not rescission, was promisees' remedy.
Douthitt v. Chenoweth, 34 S.W.2d 556.

Mo.App. 1936. In action for breach of contract to exchange property, instruction authorizing recovery if plaintiff had transferred his property under verbal agreement, and had offered to pay additional sum when defendant executed deed, instruction relating to vesting of title to property in defendant and instruction authorizing recovery, if any, for difference between value of land and mortgage indebtedness thereon, which reasonably presented plaintiff's theory of case, *held* not erroneous, especially where defendant's instruction presented converse of plaintiff's theory.
Chandler v. Guenther, 96 S.W.2d 638.

Mo.App. 1938. In action to recover damages sustained when defendants rescinded a contract for exchange of property and refused restitution to plaintiffs, where prior to time plaintiffs' note became due, defendants denied plaintiffs' right to the property which plaintiffs were entitled to receive in exchange, threatened unlawful detainer and thus denied plaintiffs' right to pay the note when due and receive title to the property, such acts constituted a repudiation of the exchange agreement so that plaintiffs were entitled to rescind the contract and sue for damages.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action for damages for defendants' failure to restore city realty to plaintiffs after defendants rescinded exchange agreement, question of liability of defendants was for jury.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action to recover for defendants' failure to restore city realty to plaintiffs after rescission by defendants of exchange agreement whereby plaintiffs exchanged city realty for farm, where plaintiffs had surrendered possession of farm, and there was evidence indicating that surrender was voluntary, court erred in refusing to instruct that if plaintiffs voluntarily moved from the farm, plaintiffs could not recover.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action to recover for defendants' failure to restore city realty to plaintiffs after defendants' rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, plaintiffs executing note for difference, and plaintiffs abandoned farm before note was due, court erred in refusing instruction that if plaintiffs voluntarily left farm, verdict should be for defendants even though note was not yet due.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action to recover for defendants' failure to restore city realty to plaintiffs after rescission by defendants of exchange agreement whereby plaintiffs exchanged city realty for defendants' farm, plaintiffs executing note for difference, court properly refused instruction that if unpaid note was due at time plaintiffs surrendered possession of farm, plaintiffs could not recover, since defendants had no right to deny plaintiffs' right to the farm even though debt was due.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

⇐8 (2). Liens.

Mo. 1884. Where two persons exchanged lands, one tract being subject to an incumbrance, which the owner agreed, but failed to remove, afterwards dying insolvent, the other party was entitled to a vendor's lien on the tract traded by him for the amount of the incumbrance.
Bennett v. Shipley, 82 Mo. 448.

Mo.App. 1891. The mere fact that a sale of land has taken the form of an exchange, the purchase price being paid in land, instead of money, does not prevent the vendor from having a vendor's lien on the land conveyed by him, which he may enforce, in case of the exchange having been induced by false representations of the vendee as to the quality, character, or value of the land given by the vendee in exchange, by suit in equity to charge the land conveyed to the vendee with a lien for the difference between the value of the property actually received from the vendee and its value as represented by the vendee.
Florida v. Morrison, 44 Mo.App. 529.

Mo.App. 1903. One conveying lands to another in consideration of a conveyance by the latter of other lands under an agreement for the exchange of land is entitled to a

vendor's lien on the lands conveyed by him to secure the portion of the consideration represented by lands to which he obtains no title.

Johnson v. Burks, 77 S.W. 133, 103 Mo. App. 221.

Equity will enforce a vendor's lien against the grantee, though solvent, and though the grantor has an adequate remedy at law under a covenant of warranty.

Johnson v. Burks, 77 S.W. 133, 103 Mo. App. 221.

Mo.App. 1930. Money judgment and lien on property exchanged *held* warranted against defendant guilty of fraud, where relief against other defendants was denied.

Chapman v. Kraehe, 22 S.W.2d 845.

⇐8 (3). Pleading.

Mo. 1901. Plaintiff's petition set out the terms of an agreement made by him and defendant's testator whereby the latter should convey within a specified time 660 acres of land, and furnish an abstract showing clear title, and the former should deliver a stock of merchandise and convey within a certain time certain land, and furnish an abstract showing clear title; the parties binding themselves to pay $1,000 as actual damages for a breach, and in addition, in case of breach by the former, the latter might return the stock of merchandise, or its consideration, less the running expenses and $1,000, as actual damages. The petition alleged the delivery of the stock of merchandise at the value fixed by the parties' inventory, failure on the part of defendant's testator to make proper conveyance of the land, and failure to furnish an abstract showing title, and asked judgment for the value of the goods as determined by the inventory. *Held*, that the petition, though stating all the facts as provided for by the Code, constituted an action on an implied assumpsit for goods sold and delivered, which was proper, the law implying a contract on the part of defendant's testator to pay the reasonable value of the goods, when the contract between the parties was silent in respect thereto and hence an objection that the suit was an attempt to enforce an uncompleted express contract was without merit.

Redman v. Adams, 65 S.W. 300, 165 Mo. 60.

Mo. 1926. In suit to rescind exchange, prayer for accounting and offer to repay sums due defendant *held* sufficient offer to do equity.

Parish v. Casner, 282 S.W. 392.

In suit to rescind and recover land for fraud, alternative prayer for accounting *held* not condonation of fraud and election to stand on contract.

Parish v. Casner, 282 S.W. 392.

Mo.App. 1899. Where a petition for a breach of contract to exchange lands alleges that within a few days after the making of the contract defendant sold and conveyed the land to another, so as to put it out of his power to convey the same to plaintiff, it was not necessary to allege that plaintiff tendered to defendant a proper deed of the land which plaintiff agreed to convey to defendant.

Way v. Miller, 80 Mo.App. 382.

Mo.App. 1909. In a suit to recover the difference agreed to be paid on an exchange of property, a petition, in intervention by defendant's trustee in bankruptcy, admitting the contract of exchange, and alleging the defendant had been induced to agree to the difference by plaintiff's fraudulent representations, and that the value of the goods delivered to defendant was much less than the amount agreed on, but failing to state that such value was less than the value of the land defendant conveyed in exchange, was insufficient for failure to show that defendant was damaged.

Baker v. Robertson, 119 S.W. 987, 138 Mo.App. 163.

Mo.App. 1938. In action to recover for defendants' failure to restore city realty to plaintiffs after defendants' rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, where defendants' answers were general denials, defense of no demand for return of city realty was not open to defendants. Mo.St.Ann. § 1202, p. 1480, V.A.M.S. § 509.410.

McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

⇐8 (4). Evidence.

Mo. 1901. Realty was conveyed to a son by a husband and wife to enable the latter to sell it in the husband's absence. An exchange was negotiated by the wife's agent, and the son executed a deed to defendant. The abstract showed title to the realty in the wife, and when the exchange was made the deed to the son was delivered to defendant. During the negotiation such agent stated to defendant that he would notify such wife to come and see the property to be taken in exchange for the realty. *Held* insufficient, in a suit to annul the exchange, to sustain a claim that defendant accepted the deed to such realty knowing that the son only held the title in trust for such wife, and to charge him as trustee for her.

Dunnigan v. Green, 65 S.W. 287, 165 Mo. 98.

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Plaintiff and her husband executed a deed of a farm to their son to enable the former to sell it in the husband's absence, and plaintiff retained the deed. Plaintiff knew of negotiations by her agent to exchange the farm for lots, and that the exchange could not be made while she held the undelivered deed to the son. She was not satisfied with the price of the lots, but agreed to consider the trade. Subsequently she sent the deed, stating she liked the property. The agent procured a deed to the farm from the son, who informed plaintiff he had made it, and the exchange was concluded with defendant. Plaintiff did not object to her son having made the deed, and did not forbid the trade. *Held* sufficient to warrant a decree refusing to devest the title to such farm out of defendant on plaintiff's reconveying the lots.

Dunnigan v. Green, 65 S.W. 287, 165 Mo. 98.

Mo. 1902. In a suit to avoid a transaction consisting of an exchange of tracts of land, on the ground of fraud in procuring the execution and delivery of one of the deeds, evidence examined, and *held* insufficient to prove any fraud.

Wilson v. Jackson, 66 S.W. 972, 167 Mo. 135.

In a suit to avoid a deed of conveyance executed in consideration of a deed to other lands, on the ground that the transaction was induced by the fraudulent representations of the owners of the land given in exchange, the evidence showed the representations related to what could be produced on the latter land and the value of such products. The grantor examined the land he received in exchange. *Held*, that the evidence not only failed to prove representations of facts which, if false, would vitiate the transaction, but showed that the grantor did not in fact rely on them.

Wilson v. Jackson, 66 S.W. 972, 167 Mo. 135.

Mo. 1905. Evidence examined, and *held* insufficient to show an intention on plaintiff's part to repudiate the contract so as to entitle the defendant to take down and record a deed deposited by plaintiff in escrow for delivery only on the consummation of the contract.

Bales v. Roberts, 87 S.W. 914, 189 Mo. 49.

The evidence was sufficient to show willful and surreptitious breaches of the contract by the defendant entitling the plaintiff to rescission.

Bales v. Roberts, 87 S.W. 914, 189 Mo. 49.

Mo. 1908. In an action to rescind a contract for the exchange of property on the ground of fraud, *held*, that the evidence of fraud was overcome by a preponderance of the evidence to the contrary.

Younger v. Hoge, 111 S.W. 20, 211 Mo. 444, 18 L.R.A.,N.S., 94.

Mo. 1914. In a suit to set aside an exchange of land on account of fraudulent misrepresentations by defendants, evidence *held* to show the misrepresentations.

Burger v. Boardman, 162 S.W. 107, 254 Mo. 238.

Mo. 1917. In action to cancel deed and bill of sale given in exchange for hotel property, evidence *held* to show that plaintiff was induced to make exchange by known false representations of defendant as to cost of property and profits of operation.

Johnson v. Jines, 193 S.W. 15.

Mo. 1918. Evidence *held* to show that defendant falsely represented to plaintiff that he was owner of land exchanged for plaintiff's, that abstract of title which he delivered to plaintiff to induce him to exchange was reliable, and that plaintiff in reliance upon representations made exchange.

Huggins v. Davidson, 202 S.W. 395, 274 Mo. 34.

Mo. 1919. In suit to rescind exchange of farms for fraud, evidence as to misrepresentations of productiveness of farm plaintiff was to receive, and of terms of contract between parties, *held* to sustain decree for plaintiff.

Wissman v. Cornbelt Inv. Co., 209 S.W. 865.

Mo. 1920. In an action to cancel a deed, where plaintiffs asserted that they had been induced to exchange property by false representations, evidence *held* to warrant a finding that false representations were made by the real estate agent who prepared and negotiated the contract for defendants.

Vodicka v. Sette, 223 S.W. 578.

Mo. 1926. In action to recover land, evidence *held* to sustain finding of false and fraudulent statements as to value of mortgage liens given in exchange.

Parish v. Casner, 282 S.W. 392.

In action to recover exchanged land for fraud, finding that alleged subsequent purchasers were mere conduits *held* sustained under evidence.

Parish v. Casner, 282 S.W. 392.

Mo. 1927. In suit to cancel deeds in exchange of lands, burden was on plaintiffs to show fraud, reliance on representations

made, and that their action was referable to such representations.
Gross v. Byler, 297 S.W. 391.

In suit to cancel deeds in exchanges of lands for fraud, evidence *held* not to justify granting relief.
Gross v. Byler, 297 S.W. 391.

Mo. 1928. Attorney's written opinion of abstract of title furnished as contract provided *held* admissible in action to cancel deed exchanging property.
Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639.

Evidence *held* to support finding in action to cancel deed exchanging property, placing parties in statu quo.
Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639.

Mo. 1934. In suit to rescind exchange of properties, evidence *held* insufficient to authorize finding that defendant fraudulently misrepresented when he stated that he owned property conveyed by him to plaintiff.
Shannon v. Crabtree, 71 S.W.2d 709.

Mo. 1952. In suit to rescind executed oral contract for exchange of farms for alleged fraudulent representations allegedly made as to extent and boundaries of defendants' farm, wherein defendants sought to eject plaintiffs from farm to which defendants were allegedly entitled under exchange agreement, evidence sustained finding that there was no fraud, and decree that plaintiffs were not entitled to recover farm which they had conveyed to defendants but were still retaining, and judgment in ejectment against plaintiffs as to that farm together with $1 damages.
McBride v. Williams, 249 S.W.2d 422.

Mo.App. 1911. An exchange of real estate *held*, on the evidence, to have been procured by fraud.
Neuman v. Friedman, 136 S.W. 251, 156 Mo.App. 142.

In an action to rescind an exchange of real estate, evidence *held* to show that defendant agreed to reduce an incumbrance on the land offered by him, so as to equalize the agreed value of the two properties.
Neuman v. Friedman, 136 S.W. 251, 156 Mo.App. 142.

Where, in an action to rescind an exchange of real estate, the evidence showed that defendant had failed to comply with a condition in the contract of exchange to reduce an incumbrance on the land conveyed by him equity having rightfully obtained jurisdiction, it will under the general prayer of the petition for equitable relief, retain the cause for the purpose of compelling defendant to comply with such condition, though rescission has been denied on the ground that plaintiff is unable to place defendant in statu quo.
Neuman v. Friedman, 136 S.W. 251, 156 Mo.App. 142.

Mo.App. 1921. In action for breach of contract for the exchange of property, plaintiff is required to prove performance, or tender of performance, on his part.
Lewis v. Van Hooser, 227 S.W. 618, 206 Mo.App. 618.

Mo.App. 1930. Judgment for relief for fraudulently concealing condemnation order as to building cannot extend to defendant innocent of knowledge of such order.
Chapman v. Kraehe, 22 S.W.2d 845.

Mo.App. 1931. Evidence showing mere delay in furnishing deed without actual or constructive fraud *held* insufficient for recovery of damages and establishment of vendor's lien against realty conveyed, where time was not essence of contract for exchange.
Jones v. Reeves, 41 S.W.2d 605.

Mo.App. 1938. In action to recover damages sustained when defendants rescinded a contract for exchange of property and refused restitution to plaintiffs, evidence *held* to show that certain defendants were parties to exchange agreement.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action to recover damages for defendants' failure to restore city realty to plaintiffs after defendants' rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, where plaintiffs had surrendered possession of farm, burden was on plaintiffs to show that defendants repudiated the agreement and that surrender of farm was not voluntary but was because of wrongful acts of defendants.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

In action to recover for defendants' failure to restore city realty to plaintiffs after defendants' rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, the inventory in the estate of a former owner of farm which tended to show that the daughters of the deceased former owner had furnished the consideration for the conveyance of the farm to defendants and that defendants held title in trust for the daughters, was admissible.
McMillion v. Triplett, 118 S.W.2d 515, 233 Mo.App. 325.

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In action to recover for defendants' failure to restore city realty to plaintiffs after rescission of exchange agreement whereby plaintiffs exchanged city realty for farm, plaintiffs executing note for difference, evidence concerning unlawful detainer suit which some of the defendants threatened to bring, whereupon plaintiffs had surrendered farm, was admissible as tending to show that defendants erroneously assumed that plaintiffs' failure to pay the note on a certain date forfeited plaintiffs' right in the farm.

McMillion v. Triplett, 116 S.W.2d 515, 233 Mo.App. 325.

⇐8(5). Damages.

Mo. 1914. Where defendants, through their fraud, induced plaintiffs to exchange lands with them, defendants are chargeable with the reasonable rental value of plaintiffs' land during the time they had possession.

Burger v. Boardman, 162 S.W. 197, 254 Mo. 238.

⇐9. Exchange of personal property.

⇐10. —— In general.

Mo. 1925. Party agreeing to exchange *held* entitled to withhold delivery until compliance by other party with contract.

State ex rel. Major v. Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386, quashing certiorari, Major v. Hast, 263 S.W. 466.

Mo.App. 1907. Where a contract for the exchange of property provided that plaintiff's goods included in the exchange should be invoiced at St. Louis cost prices, but was silent as to the means by which such cost should be ascertained, defendant was not bound to submit to the judgment of experts as to their cost or furnish some better means of arriving at such cost, but it was plaintiff's duty to furnish the evidence of the cost of the goods in St. Louis.

Inlow v. Bybee, 99 S.W. 785, 122 Mo. App. 475.

Mo.App. 1924. Owner of stock of goods, who had agreed to exchange goods for an automobile, could refuse to deliver goods without first rescinding the contract, on other party's failure to deliver the automobile pursuant to agreement, since the transaction was not a sale but a barter, and the contract did not vest owner of automobile with title to goods.

Major v. Hast, 263 S.W. 466, certiorari quashed State ex rel. Major v. Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386.

⇐11. —— Rescission.

Mo.App. 1885. Where one has been induced by false and fraudulent misrepresentations to make an exchange of property, he must, if he wishes to assert his right to rescind and recover his property, do so at once, by placing or offering to place the other party in statu quo, and the rescission must be total.

Cahn v. Reid, 18 Mo.App. 115.

Mo.App. 1912. On an exchange of horses with warranty as to soundness, the party receiving an unsound one was entitled to rescind and recover the horse given in exchange.

Griffin v. McDonald, 145 S.W. 505, 163 Mo.App. 84.

⇐12. —— Warranties.

Mo.App. 1912. On an exchange of horses, lack of knowledge of the diseased condition of a horse warranted did not relieve the warrantor from liability.

Griffin v. McDonald, 145 S.W. 505, 163 Mo.App. 84.

⇐13. —— Remedies.

⇐13(1). In general.

For cases from other jurisdictions, see other Key Number Digests.

⇐13(2). Conditions precedent.

Mo.App. 1911. Where parties trade horses upon an express contract that one of them shall, in a certain event, have the right to return the other's horse and boot money, and receive his own horse back, a tender, in an action for breach of contract, of such boot money is unnecessary, where the other party has previously disposed of the horse taken in the trade, and denies his obligation to return it, even if a tender was made.

Mekos v. Fricke, 139 S.W. 1181, 159 Mo. App. 631.

⇐13(3). Evidence.

Mo.App. 1912. Evidence in replevin *held* to show a warranty of a stallion traded and that the stallion had a genital disease.

Griffin v. McDonald, 145 S.W. 505, 163 Mo.App. 84.

Mo.App. 1914. Evidence in replevin for a horse traded to defendant *held* to show that defendant agreed to take back his horse, if there was anything defective in the horse traded to plaintiff other than certain defects noticed at the time.

Irby v. Stubblefield, 162 S.W. 660, 177 Mo.App. 256.

For references to other topics, see Descriptive-Word Index

Mo.App. 1922. In an action concerning a horse traded to plaintiffs, evidence *held* to show that plaintiffs made an offer amounting to legal tender of the horse to defendant, which, together with the fact that they retained possession of it for defendant's benefit whenever he might choose to receive it, answers the same purpose as an actual return.

Field Bros. v. Green, 236 S.W. 1076.

Mo.App. 1931. Evidence sustained finding that conspiracy and fraud in respect to exchange of automobile was not established.

Drown v. Tough, 38 S.W.2d 736, 225 Mo. App. 1017.

⇐13 (4). Trial.

Mo.App. 1907. Whether plaintiff furnished or offered to furnish reasonably satisfactory evidence of the St. Louis cost of the goods was for the jury.

Inlow v. Bybee, 99 S.W. 785, 122 Mo. App. 475.

Mo.App. 1922. In an action against the seller of a horse traded to plaintiffs, who sought to recover the consideration paid on the ground of false representation that it was a gentle, quiet, and a good work horse, evidence *held* sufficient to make out a case for the jury.

Field Bros. v. Green, 236 S.W. 1076.

⇐13 (5). Damages.

Mo.App. 1913. Where plaintiff traded a stallion and a jack and a note for $300 for a stallion received from defendants and elected to rescind for breach of warranty, the measure of his damages was the amount of the note and the market value of the animals transferred to defendants.

Shannon v. Abell, 155 S.W. 62, 169 Mo. App. 598.

⇐14. —— Conditional exchange.

For cases from other jurisdictions, see other Key Number Digests.

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EXCHANGES

Scope-Note.

INCLUDES bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

Matters not in this topic, treated elsewhere, see Descriptive-Word Index.

Analysis.

⇐1. Nature and status in general.
2. Statutory provisions.
3. Incorporation and organization.
4. Constitution, by-laws, and rules.
5. Membership in general.
   (1). In general.
   (2). Expulsion or suspension of members.
   (3). Reinstatement of members.
6. Stock.
7. Property in seat or membership, and transfer thereof.
8. Dues, fines, and assessments.
9. Mutual dealings and liabilities of members.
10. Officers and committees.
12. Rights and liabilities as to persons not members.
13. Quotations of prices and transactions.
14. Actions by or against exchanges.
15. Dissolution.

⇐1. Nature and status in general.

Mo. 1910. The business of a board of trade and its members in the handling, buying, and selling of grain is such that the public has an interest therein, and the public is so largely affected thereby that such boards may be controlled by the Legislature.

House v. Mayes, 127 S.W. 305, 227 Mo. 617, affirmed 31 S.Ct. 234, 219 U.S. 270, 55 L.Ed. 213.

⇐2-3.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐4. Constitution, by-laws, and rules.

A rule, adopted by a merchant's exchange, providing that on all sales of grain in bulk on elevator receipts, the buyer shall pay the first 10 days' storage, unless otherwise specified at the time of sale, is valid and binding on members transacting business on the exchange.

Mo. 1883. Goddard v. Merchants' Exch., 78 Mo. 609.

Mo.App. 1880. Goddard v. Merchants' Exch., 9 Mo.App. 290.

Mo. 1907. A rule of an exchange providing that the directors thereof shall fix the value of any commodity for marginal purposes, and, where contracting parties fail to adjust their respective claims under a contract on which margins have been deposited, the party claiming the deposit may apply to the board, who shall have power to direct the payment of such portion of it as may appear to be due under the rules of the exchange, etc., is a valid rule, and will be enforced.

C. H. Albers Commission Co. v. Spencer, 103 S.W. 523, 205 Mo. 105, 11 L.R.A., N.S., 1003.

Mo. 1913. Member of voluntary board of trade association is not estopped from relying on constitution and by-laws of association merely because he has induced others in different matters to yield obedience to unauthorized orders of directors.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 250 Mo. 168.

Mo.App. 1876. Where it was practically necessary for merchants to belong to a produce exchange in order to carry on their business, a by-law of such exchange requiring all differences between the members to be submitted to arbitration was unreasonable and void.

State ex rel. Kennedy v. Union Merchants' Exch., 2 Mo.App. 96.

Mo.App. 1876. A by-law of a produce exchange, providing for a board of arbitrators to which members may submit their differences, and declaring that such board shall enter in a book kept for that purpose a summary of the controversy, or the award made, or grounds thereof, does not make an award which has not been so entered void; the provision as to entering a summary of the controversy and of the award being merely directory.

Sweeney v. Vaudry, 2 Mo.App. 352.

Mo.App. 1890. Where the rules of a merchants' exchange give the board of directors control over the exchange, and provide that they may establish such rules and regulations in regard to the use of same as may seem proper, the directors have power to make a regulation extending the time during the day prescribed in a by-law within which smoking was prohibited in the exchange room.

Albers v. Merchants' Exch., 39 Mo.App. 583.

Where the charter of a merchants' exchange, a corporation, provided that the rules, regulations, and by-laws of the association which existed prior to the act of incorporation should be the rules, regulations, and by-laws of the corporation until regularly repealed or altered, such rules, regulations, and by-laws are not part of the charter, and whether or not they are valid as by-laws must depend on rules which determine their validity as by-laws of a corporation.

Albers v. Merchants' Exch., 39 Mo.App. 583.

Mo.App. 1908. The constitution and rules of a board of trade, a voluntary association organized for the convenience of its members in trading in grain, required its members to submit all disputes of a financial character, whether with members of the association or other parties, when such other parties assent thereto, to the arbitration committee of the board, and to abide by their awards, as well as to observe the rules and regulations of the association, and provided that the board of directors shall have power to determine whether any demand is a proper one for arbitration, and their conclusion shall be final and not reviewable in any court, and any member who shall, after such decision, begin an action at law against another before offering to arbitrate such dispute and receiving a refusal thereof may be expelled, providing that if the board of directors order that an arbitration shall not be required, either party may sue. The by-laws further provided when delivery on track sales should be considered as made, and provision was made for amending the by-laws, etc. *Held*, that the provisions were not contrary to the policy of the law, and were binding upon the members of the association.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 694.

A voluntary organization of men engaged in the same business, formed not for profit, but to provide a convenient place for members to transact business under prescribed rules, is regarded by the courts with approval, and, so long as the rules are not immoral or contrary to legal policy, courts will not interfere, and quasi judicial tribunals organized under the constitution and by-laws of such associations will not be disturbed or their reasonableness questioned, as the members enter into it voluntarily, and are bound by such rules and decisions so long as they are in harmony with the general spirit of the law, but if such rules and regulations exceed those limits courts of equity will interfere to correct their decisions, as the state will not permit any individual to assume the powers of sovereignty in hostility to the settled policy of laws.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

A by-law of defendant board of trade association provided that in order to constitute a delivery of grain on track, the vendor should tender the vendee an invoice, accompanied by expense bill, order in writing for the grain, and inspection certificate. By the constitution the by-laws could not be repealed or amended except by a majority vote of the members of the society present and at a special meeting called for that purpose, but during a flood which destroyed much grain which had been sold, and which gave rise to disputes between members as to whether title to the grain destroyed on track had passed, the board of directors adopted a resolution to the effect that on all sales of track grain the title passed when the sale was made and the ticket passed without the other requisites required by the by-laws. *Held*, that the act of the directors in so extending the by-laws and rules could not be justified by the laws of the association or in good conscience, and was arbitrary

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and oppressive, and not binding upon the members of the association.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

Mo.App. 1909. Where plaintiff, who was a member of a trade exchange, and another member thereof, executed, bought, and sold notes, which provided that the sale was subject to the rules of the exchange, by which plaintiff agreed to deliver wheat on a certain date, and the buyer, on plaintiff's refusal to deliver on that date, without consulting plaintiff, retained a part of the money deposited by him as security for delivery, as damages for plaintiff's breach of contract, on the basis of the value of wheat as fixed by the exchange on the day of delivery, but plaintiff claimed that the price fixed was fictitiously created by the buyer and others by cornering the wheat market, and instituted suits to establish his claim, there was no "settlement" between the parties so as to require plaintiff to surrender the contracts with the buyer under an alleged implied rule of the trade exchange requiring the parties to surrender contracts upon a settlement; that term implying an accounting and adjustment and a liquidation in regard to accounts and involving the idea of mutuality.

Albers v. Merchants' Exch. of St. Louis, 120 S.W. 139, 140 Mo.App. 446.

Mo.App. 1922. A resolution of a merchants' exchange, prohibiting its members during the remainder of the calendar year from making any purchases or sale of November or December corn except in "liquidation of existing contracts," *held* not applicable to contracts obligating defendant, at plaintiff's option, to make a written contract whereby he would be obligated to deliver to plaintiff certain quantities of corn at certain specified prices during a specified month; they being existing contracts within meaning of such resolution.

Young v. Lanyon, 242 S.W. 685.

Mo.App. 1938. Where broker bought stock for customer, on margin, through New York correspondent, on broker's account, and broker pledged stock to correspondent, as authorized by contract with customer, transaction did not violate rule of New York Stock Exchange which provided that no member, while acting as broker, shall buy or sell for his own account or that of a partner, securities, the order for the sale or purchase of which has been accepted by him or his firm.

Esmar v. Haeussler, 115 S.W.2d 54, 234 Mo.App. 217, transferred 106 S.W.2d 412, 341 Mo. 33.

⇐5. Membership in general.

⇐5(1). In general.

Mo. 1913. A member of a voluntary board of trade association is not estopped from relying on the constitution and by-laws of the association merely because he has induced others in different matters to yield obedience to unauthorized orders of the board of directors.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 250 Mo. 168.

Mo.App. 1899. It being competent for a board of trade to determine what acts of members shall be misconduct, it follows that the question of whether its rules in that respect are reasonable cannot be examined by the courts.

Farmer v. Board of Trade of Kansas City, 78 Mo.App. 557.

⇐5 (2). Expulsion or suspension of members.

Mo. 1897. Where an exchange made a reasonable regulation prohibiting smoking during business hours, and a member thereof violated for several days such rule, in a defiant manner, and, on the advice of an attorney, he was fined by the directors of such exchange, and, on failure to pay the same, was suspended, no malice is shown on the part of the officers of the exchange, though the suspension was subsequently annulled by decree of court.

Albers v. Merchants' Exchange of St. Louis, 39 S.W. 473, 138 Mo. 140.

Where a member of an exchange was suspended for a day, but his business was not molested thereby, and he could make no estimate of any loss suffered by not being on the exchange, he could not recover therefor in an action against the exchange for unlawful suspension.

Albers v. Merchants' Exchange of St. Louis, 39 S.W. 473, 138 Mo. 140.

Mo. 1913. A member of a voluntary board of trade association, the constitution of which requires every member to submit mercantile disputes to arbitration, does not refuse to arbitrate until a request has been made for arbitration and an opportunity afforded him to either refuse or accept arbitration.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 25 Mo. 168.

A member of a voluntary board of trade association, who was refused the right to arbitrate and who asserts that the board of directors are interested in like controversies and is attempting to pass on its own cases and that the board has acted outside its authority, is not guilty of circulating false or

slanderous reports relative to the business affairs of members or officers.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 25 Mo. 168.

A member of a voluntary board of trade association, who institutes a suit against the association and its officers to restrain an unlawful attempt to oust him from membership in disregard of the constitution of the association, does not thereby violate the constitution binding members not to resort to tribunals other than those provided by the association.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 25 Mo. 168.

Where the board of directors of a voluntary board of trade association, vested with power to try members on charges, has not indicated any intent to proceed on the hearing of charges in any way, except in accordance with the constitution and rules of the association, equity will not in advance of a trial on the charges restrain the association and its officers from proceeding with a trial.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 25 Mo. 168.

Mo.App. 1890. Whether a member of a merchants' exchange, a corporation, can be properly suspended on a charge preferred by a person not himself a member, is a matter relating to the details of the procedure, with which the courts will not interfere.

Albers v. Merchants' Exch., 39 Mo.App. 583.

Under the charter of a merchants' exchange, a corporation, providing that the board of directors shall have power to suspend or expel any member for misconduct or for violation of any of the rules or regulations or by-laws of the exchange, failure to pay a fine imposed for violation of a regulation is not misconduct authorizing suspension of a member.

Albers v. Merchants' Exch., 39 Mo.App. 583.

Under Rev.St.1879, § 2722, providing that the remedy by writ of injunction shall exist in all cases where an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages, injunction may be maintained by a commission merchant, doing a business in volume varying between $10,000,000 and $20,000,000 a year against a merchants' exchange, a corporation of which he is a member, to restrain it from interfering with his rights as a member because of his suspension for refusal to pay a fine imposed by the directors for violation of one of its regulations.

Albers v. Merchants' Exch., 39 Mo.App. 583.

Mo.App. 1899. Where a bill to restrain a board of trade alleges that it is about to expel him, but the complaint against such member charges him with having violated a section of the constitution, the bill should be dismissed.

Farmer v. Board of Trade of Kansas City, 78 Mo.App. 557.

A board of trade has authority, under its constitution and rules, to try a member on a charge that he has made and circulated false reports against the officers, appointees, and committees of the association.

Farmer v. Board of Trade of Kansas City, 78 Mo.App. 557.

A board of trade has authority, under its constitution and rules, to try a member on a charge that he has bought wheat of another member under the pretense that the deal was a cash transaction, when in fact he had the concealed design to compel acceptance as a set-off a disputed note.

Farmer v. Board of Trade of Kansas City, 78 Mo.App. 557.

Mo.App. 1908. A by-law of defendant board of trade association provided that no member should institute any proceedings in a court of law to settle any controversy between members, but should refer all such controversies to tribunals provided by the association, and should not make any complaint or demand by suit or otherwise which was based upon any act done, or resolution or order made, by any person while acting as officer, etc., of the association. *Held*, that, reasonably interpreted, the by-laws did not deny a member access to the courts in cases where the officers in control of the association acted arbitrarily and in violation of the law and the rules of the association, as otherwise the by-laws would be condemned as opposed to the policy of law, and where plaintiffs had reason to believe that defendants intended to expel them from the association because they had resisted the unlawful and arbitrary violation of their rights as members of the association, plaintiffs were justified in resorting to the courts to enjoin their expulsion.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

In a suit to enjoin the expulsion of plaintiffs from defendant board of trade association, the evidence *held* to show that defendant intended to, and was about to, expel

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plaintiffs from the association when the injunction suit was brought.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

The maxim that "he who seeks equity must come with clean hands" applies only to the conduct relating to the subject of the litigation, and not where it relates to conduct with other parties and under different circumstances and conditions, and where plaintiffs, members of a board of trade association, availed themselves, in a transaction with other parties, of a regulation of the association providing that deliveries on track sales for shipment should be made by tender of invoice, accompanied by expense bill, order in writing for the grain, and inspection certificate, they were not thereby estopped from enjoining their expulsion as members because they refused to abide by an arbitrary resolution of the directors deciding that deliveries made upon track passed title when the ticket passed, though complete delivery of the grain had not been made, such resolution being contrary to the by-laws of the association and not having been passed by a majority thereof as an amendment, and having been arbitrarily adopted by the directors after a flood had destroyed large quantities of grain on track, in order to benefit the sellers, and pass title to the grain in cases where it would not have passed under the former laws of the association.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

Mo.App. 1909. A proceeding to forfeit the membership rights of a member of a trade exchange for a violation of the by-laws is a penal proceeding, and the by-laws, like penal statutes, should be strictly construed and nothing taken by intendment or implication for the purpose of working a forfeiture.

Albers v. Merchants' Exch. of St. Louis, 120 S.W. 139, 140 Mo.App. 446.

⇐5(3). Reinstatement of members.

Mo. 1905. Where a member of a stock exchange, who was expelled for nonpayment of dues, took no steps to secure reinstatement until more than a year had elapsed, and seats in the exchange, which were valueless when he was expelled, had become worth $7,500, he was guilty of such delay as to preclude equitable relief.

Konta v. St. Louis Stock Exch., 87 S.W. 969, 189 Mo. 26.

⇐6. Stock.

For cases from other jurisdictions, see other Key Number Digests.

⇐7. Property in seat or membership, and transfer thereof.

D.C.Mo. 1901. The constitution of the St. Louis Stock Exchange provides for the expulsion of members who are found guilty of fraud by the governing committee, and that their membership "shall be disposed of by the committee on admissions." There is no provision as to what shall be done with the proceeds, but, in case of the death of a member, the proceeds of his membership are to be used to pay any indebtedness due the association or its members, so far as required for that purpose, the remainder, if any, to be paid to his estate, and, in case of a member's suspension for insolvency and his failure to become reinstated under the rules, his membership is to be sold, and the proceeds paid pro rata to his creditors on the exchange. *Held* that, in the absence of any specific provision therefor, the expulsion of a member for fraud could not be considered as forfeiting to the exchange his property rights in his seat, and that the proceeds, after paying any claims of the exchange or its members, belong to the expelled member.

In re Gaylord, 111 F. 717.

Mo.App. 1929. Assignee of certificate of membership in live stock exchange could not recover benefit payable at death of member, in that fund was not subject to assignment.

South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W. 2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

Membership in live stock exchange is property subject to assignment.

South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W. 2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

Assignee permitting assignor of membership certificate in stock exchange to remain in complete dominion waived right of lien.

South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W. 2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

⇐8. Dues, fines, and assessments.

Mo.App. 1890. A rule of a merchants' exchange, a corporation, providing that for disorderly or improper conduct in any of the rooms of the exchange a member may be fined, suspended, or expelled, as the directors may determine, is void, since it grants an indefinite power to fine, without placing any limit upon the amount of the fine.

Albers v. Merchants' Exch., 39 Mo.App. 583.

For references to other topics, see Descriptive-Word Index

⇐9. Mutual dealings and liabilities of members.

Mo. 1907. A member of an exchange sold to other members thereof wheat for future delivery, subject to the rules of the exchange providing that the board of directors thereof on the application of a party in interest should fix the value of any commodity for marginal purposes, and, on parties failing to adjust their claims under a contract on which margins had been deposited, the party claiming the deposit might apply to the board for orders for payment thereof. Pursuant to the rules of the exchange, the member deposited in a bank a specified sum to secure the performance of his contract of sale. He brought suit in equity for the cancellation of the contract and for the recovery of the deposit, on the ground that the other members had cornered the wheat market and had forced the price up to a fictitious amount. *Held*, that he could not invoke the aid of equity without first seeking relief by proceeding in the manner prescribed by the rules of the exchange.

C. H. Albers Commission Co. v. Spencer, 103 S.W. 523, 205 Mo. 105, 11 L.R.A., N.S., 1003.

Mo. 1917. Where contract provided that it was subject to rules and regulations of Merchants' Exchange, such rules and regulations became a part of the contract.

Helm v. C. H. Albers Commission Co., 199 S.W. 1008.

Where, on default in contract for delivery of wheat, both parties appeared before board of directors of exchange, and question of interest was fully argued, but interest was not allowed, *held* acceptance by buyer of amount allowed estopped him from bringing suit for interest.

Helm v. C. H. Albers Commission Co., 199 S.W. 1008.

Mo.App. 1879. In an action by the seller for failure to perform a contract of sale, it was shown that plaintiffs, after giving notice of their intention to deliver the article sold on the 1st day of March, failed to tender or deliver a proper merchantable article, duly certified by the inspector to be such, at or before 10 o'clock in the morning of the next following day, as provided for by the rules of the Union Merchants' Exchange, which were made a part of the contract. *Held*, that plaintiff could not recover, the rule of the exchange being explicit, in such a state of facts, that the buyer should have the right to claim a nonfulfillment of the contract, and proceed as if the time of the contract had expired, and no tender had been made; and there is no foundation for a claim that the inspector was an agent for both parties, and that his postponement of the inspection until the third day was a waiver as to time on the part of defendant.

Bassett v. Irons, 8 Mo.App. 127.

Mo.App. 1908. The by-laws of defendant board of trade association provided that all disputes among members, etc., should be referred to the committee of arbitration for adjustment, and empowered the board of directors to determine whether any demand was proper for arbitration, and made their decision final, provided that the directors might order that an arbitration should not be required, when either party might sue. *Held* that, while under the by-laws the directors had power to discipline a member who refused to perform a judgment of the committee of arbitration, it could not adjust claims disputed in good faith, and, where members claimed that they were not compelled by the laws of the association to pay for a car of grain, it was the duty of the board to decide whether the controversy was a proper subject of arbitration, and, if so, to refer it to the arbitration committee, and the directors had no power to themselves abitrarily decide the disputed question and punish members who refused to be bound by their decision.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

If defendant board of trade association which required all its members to refer financial controversies to the board of arbitration should pass by-laws to compel its members to submit a controversy to interested and partial judges, such by-laws would be contrary to legal policy as well as natural right, and would be void, and where, in a controversy between members of the association as to their right to make payment under the by-laws, disinterested parties could not be found to serve on the committee of arbitration, the members should have been sent to the courts to determine the controversy, as a decision of a committee of arbitration composed of interested persons would not be allowed to stand.

Moffatt v. Board of Trade of Kansas City, 111 S.W. 894.

Mo.App. 1916. In suit for an accounting by member of exchange for damages in settling "future" grain contract in alleged "corner," pleading and proof *held* not to warrant recovery.

Albers v. Moffitt, 187 S.W. 903.

Mo.App. 1925. Appellate arbitration tribunal *held* not to have violated rule prohibiting taking testimony on appeal.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

For later cases see same Topic and Key Number in Pocket Parts

Rule prohibiting introducing new testimony in appellate arbitration tribunal enforced.

Fernandes Grain Co. v. Hunter, 274 S.W. 901, 217 Mo.App. 187.

Party to arbitration cannot complain of irregularity in which he participated.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

Alleged statement of one of arbitrators insufficient showing of prejudice to avoid award.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

Permitting party in appellate arbitration tribunal to repeat certain testimony *held* proper under rules.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

That one party denied counsel before appellate arbitration tribunal immaterial, where other party without counsel.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

Change in personnel of appellate arbitration tribunal between hearings *held* not prejudicial.

Fernandes Grain Co. v. Hunter, 274 S. W. 901, 217 Mo.App. 187.

⇐10. Officers and committees.

Mo. 1913. A member of a voluntary board of trade association, who agrees to observe the constitution and by-laws and to be subject to fine, suspension, or expulsion in case of a violation thereof, does not thereby agree that the board of directors may exercise powers not conferred by the constitution.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 250 Mo. 168.

The constitution of a voluntary board of trade association, which requires the submission to arbitration of financial, mercantile, or commercial disputes, and which authorizes the board of directors to determine whether a demand is a proper one for arbitration, does not authorize the board of directors to decide a matter in dispute between members, and a decision is without effect.

Moffatt v. Board of Trade of Kansas City, 157 S.W. 579, 250 Mo. 168.

Mo.App. 1892. A member of a merchants' exchange is not guilty of contributory negligence as matter of law in assuming that the clerk of the call board will put down a sale made by him correctly in the call book.

Warren v. St. Louis Merchants' Exch., 52 Mo.App. 157.

It could not be said as matter of law that the clerk of the call board of a merchants' exchange was not guilty of negligence in failing to enter a sale made by a member in his call book.

Warren v. St. Louis Merchants' Exch., 52 Mo.App. 157.

In the absence of a statute or provision in its articles of association or by-laws, a merchants' exchange is not liable for the negligence of the clerk of its call board in failing to enter a sale in his call book; there being no claim that the person selected as clerk is not entirely competent to fill the office.

Warren v. St. Louis Merchants' Exch., 52 Mo.App. 157.

⇐12. Rights and liabilities as to persons not members.

For cases from other jurisdictions, see other Key Number Digests.

⇐13. Quotations of prices and transactions.

U.S.Mo. 1905. The use and distribution of the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected by the Chicago Board of Trade, and which cannot be obtained by those so using and distributing them without a known breach of the confidential terms on which they are communicated by the board of trade to its customers, may be enjoined, even assuming that such quotations relate to 'pretended buying and selling," within the meaning of Act Ill. June 6, 1887, prohibiting the keeping of places where such transactions are committed.

Board of Trade of City of Chicago v. Christie Grain & Stock Co., 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031, affirming Board of Trade of City of Chicago v. L. A. Kinsey Co., 130 F. 507, 64 C.C.A. 669, 69 L.R A. 59, and reversing 125 F. 161, 61 C.C.A. 11.

The Chicago Board of Trade has a property right in the market quotations made and posted in its exchange, and is entitled to protection in equity by injunction against the use of such quotations by another without its consent for such length of time after they are made as to enable it to secure to itself the benefit of such right; nor is it required to furnish its quotations to one conducting a bucket shop.

C.C.A.Mo. 1906. Board of Trade of City of Chicago v. Cella Commission Co., 145 F. 28, 76 C.C.A. 28, reversing 121 F. 1012.

C.C.A.Mo. 1906. Board of Trade of City of Chicago v. Donovan Commis-

For references to other topics, see Descriptive-Word Index

sion Co., 145 F. 31, 76 C.C.A. 16, reversing 121 F. 1012.

C.C.A.Mo. 1906. A board of trade, which has a right of property in market quotations collected in its exchange, does not surrender them to the public by permitting subscribers, to whom they are communicated upon condition that they shall not be made public, to post them on blackboards in their places of business, to the advantage of the subscribers and not to the public and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value.

McDearmott Commission Co. v. Board of Trade of City of Chicago, 146 F. 961, 77 C.C.A. 479, 7 L.R.A.,N.S., 889, 8 Ann.Cas. 759, affirming 143 F. 188.

C.C.Mo. 1902. In the absence of legislative action, a court of equity is not authorized to deny relief to a corporation conducting a market exchange merely because the chancellor is of the opinion that its business, originally private, has grown to such magnitude and assumed such importance that the public is entitled to an interest therein and to a control thereof commensurate with that interest. When such a condition arises, the measure of the public control is limited by the extent of the public interest, and the initiative in declaring a public use and the making of regulations pertaining thereto are of legislative, and not judicial, cognizance.

Board of Trade of City of Chicago v. Christie Grain & Stock Co., 116 F. 944, reversed 125 F. 161, 61 C.C.A. 11, reversed 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.

The rules of the Board of Trade of the City of Chicago prohibit gambling transactions on its exchange, and impose upon both parties to a sale for future delivery the obligation to deliver and receive the commodity sold, and in view of such rules all sales made thereunder are presumptively valid, and the burden of proof rests upon one asserting the contrary to show that neither party to the transaction contemplated an actual delivery; nor does the mere fact that gambling transactions may be carried on in its exchange, in violation of its rules, establish the claim that the organization is a bucket-shop concern, doing business in violation of the laws of the state, and therefore not entitled to maintain a suit in equity to protect its property right in its market quotations, it being indisputable that it transacts a vast amount of legitimate business.

Board of Trade of City of Chicago v. Christie Grain & Stock Co., 116 F. 944, reversed 125 F. 161, 61 C.C.A. 11, reversed 25 S.Ct. 637, 198 U.S. 236, 49 L.Ed. 1031.

C.C.Mo. 1906. Where the contract between complainant board of trade and telegraph companies, with reference to the dissemination of plaintiff's quotations, referred only to "continuous quotations," which the contract defined as "quotations wherein the price on any commodity shall be quoted oftener than at intervals of ten minutes," complainant was only entitled to restrain defendants from obtaining and using quotations which were continuous.

Board of Trade of City of Chicago v. McDearmott Commission Co., 143 F. 188, affirmed 146 F. 961, 77 C.C.A. 479, 7 L.R.A.,N.S., 889, 8 Ann.Cas. 759.

Where complainant board of trade collected price quotations which it furnished to certain telegraph companies under contract that they would transmit the same only to those who would contract and pay therefor for their own legitimate use and the use of their patrons, the fact that complainant permitted such quotations to be immediately and continuously posted on the boards of another exchange known as the "Open Board of Trade of Chicago," and on other boards of customers to which the public had access, did not constitute such a publication of the quotations as authorized their free use by the public.

Board of Trade of City of Chicago v. McDearmott Commission Co., 143 F. 188, affirmed 146 F. 961, 77 C.C.A. 479, 7 L.R.A.,N.S., 889, 8 Ann.Cas. 759.

⇐14. Actions by or against exchanges.

C.C.Mo. 1907. In a suit by a commercial exchange to restrain counterfeiting and simulation of its quotations, a paragraph of the bill containing a recitation of the objects of complainant corporation and the powers conferred by its charter was not objectionable for irrelevancy or immateriality.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

Allegations as to the number of members of complainant corporation, the cost of maintaining and conducting its operations, how the necessary fund was raised, the worth of a membership in the exchange, and the character of the persons who might be admitted, were immaterial and irrelevant.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a commercial exchange to restrain simulation and counterfeiting of its

quotations, a paragraph of the bill alleging the manner of operating complainant's exchange, the way in which the information of the operation and markets are distributed and conveyed through telegraph companies throughout the country, and the time occupied in disseminating such information, was not objectionable for irrelevancy or immateriality.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a commercial exchange to restrain alleged simulation and counterfeiting of its quotations, allegations in a paragraph of the bill reciting the circumstances which induced complainant to refuse to allow its quotations to be given to telegraph companies, except under contract that they would not furnish the same to persons desiring to operate bucket shops, in which business it was claimed defendants were engaged, was proper matter of inducement, and was not subject to exceptions for immateriality.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a commercial exchange to protect its quotations from simulation, a paragraph of the bill alleging the relations and contracts between complainant and certain telegraph companies, with which it was not claimed defendants were in any wise connected or against which they were making no claim, was subject to exceptions for irrelevancy.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

A paragraph of a bill by a commercial exchange to protect its quotations from simulation, alleging that no person or corporation was receiving market quotations from any of the telegraph companies specified, without having executed complainant's written contract restraining the furnishing of such quotations to bucket shop operators, was objectionable for immateriality.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

Where, in a suit by a commercial exchange to protect its quotations, complainant alleged that they were furnished only under contract required by complainant with certain telegraph companies, restricting the use of the quotations, allegations that none of the defendants had delivered to any of the telegraph companies a contract therefor in the required forms, and that defendants had not acquired the right to receive such quotations, either from the telegraph companies or from any person to whom the telegraph companies were furnishing the quotations, were not objectionable for immateriality or irrelevancy.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a commercial exchange to protect its quotations, an allegation that after complainant refused to furnish quotations to telegraph companies, except on the execution of certain contracts restricting the use of such quotations, certain persons conducting bucket shops obtained the quotations surreptitiously, whereupon injunction suits were instituted in different courts of the country, some of which were against the present defendants, in which suits complainant was successful, merely stated at most a mere matter of evidence, and was therefore improper.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

An allegation of matter of evidence of defendant's intent in organizing defendant Board of Trade, a rival exchange, was improper.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a commercial exchange to protect its quotations against simulation by parties not entitled to use the same under contract required by complainant, an allegation in the bill of the existence of defendant Board of Trade, what it was designed to accomplish, what it did, and what it represented with reference to the simulation of complainant's quotations, was immaterial.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

In a suit by a Chicago commercial exchange to restrain simulation of its quotations by persons in Kansas City and vicinity, alleged not to be entitled to complainant's quotations, an allegation in a bill that there were no business conditions justifying or giving rise to any trading in grain or provisions in Kansas City which contemplated or involved delivery in Chicago or of grain or provisions located in Chicago, or to the dissemination of quotations in such transactions, was irrelevant.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

For references to other topics, see Descriptive-Word Index

Paragraphs charging that, to carry out the illegal purpose of counterfeiting and indirectly obtaining the benefit of complainant's quotations, defendants, other than defendant Board of Trade co-operating with others, organized such Board of Trade and rented a building in Kansas City to maintain a commercial exchange, and setting out the purposes and aims of the defendants to obtain complainant's continuous quotations in fraud of its rights, were applicable to the history and purposes of defendant organization and its pretensions, and were not, therefore, objectionable for immateriality.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

An allegation that, in order to overcome the legal obstacles and to simulate complainant's quotations, defendants, by petition, assert that the transactions made in the exchange room of defendant exchange are for future delivery in the city of Chicago, or for the delivery of warehouse receipts issued by Chicago warehouses, was neither impertinent or irrelevant.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

An allegation that the offerings of defendants, through defendant exchange, were not bona fide, and that their alleged contracts for the purchase and sale of grain and provisions were not real, and did not contemplate real deliveries in Chicago, but were mere pretenses to conceal the real purpose, was pertinent and relevant.

Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo., 154 F. 238.

C.C.Mo. 1910. In a suit to restrain defendants from receiving or using continuous quotations of the Chicago Board of Trade, individually and as the Price Commission Company, evidence *held* insufficient to show that defendant P. was in any manner interested with such company, or had engaged in its business, or received the quotations.

Board of Trade of City of Chicago v. Price, 179 F. 399, reversed 213 F. 336, 130 C.C.A. 302.

Mo.App. 1883. The rules of a stock exchange provided that, in case any property contracted for future delivery should not be delivered at maturity of the contract, the purchaser might demand a settlement at the average market value of the property on the day of maturity, and that in determining average market value the committee of arbitration should consider its value in other markets, or for manufacturing or consumptive purposes in the local market. *Held* that, in an action to recover a sum of money claimed to be due to plaintiffs from defendant on account of sales of wheat for future delivery, made by the former as brokers for the latter, where it appeared that a certain "deal" was settled according to the ruling market at the end of a certain month, but that the market had been forced up to a fictitious point, it was error to refuse to instruct that the burden was on plaintiffs to show what the market value was, since as between the brokers and defendant the only market for which they could claim a settlement or charge losses against him was an average market for manufacturing or consumptive purposes.

Kent v. Miltenberger, 13 Mo.App. 503.

⇐15. Dissolution.

For cases from other jurisdictions, see other Key Number Digests.

For later cases
see
Same Topic and Key Number
in Pocket Parts

EXECUTION

Scope-Note.

INCLUDES enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.

Matters not in this topic, treated elsewhere, see Descriptive-Word Index.

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For references to other topics, see Descriptive-Word Index

I. NATURE AND ESSENTIALS IN GENERAL.

⇐1-2.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐3. Constitutional and statutory provisions.

C.C.A.Mo. 1942. Statutes relating to enforcement of judgments, such as the levy of executions and sale of property, are, in absence of a contrary legislative intent, applicable to judgments whether obtained before or after their passage.

Benas v. Maher, 128 F.2d 247.

Mo. 1834. Act Jan., 1831, entitled "An act in addition to an act to regulate executions," is an additional act to the general execution law of February 21, 1825, and not to the act of December 30, 1824, which was intended only to regulate proceedings against corporations.

Lindell v. Wash, 3 Mo. 512.

Mo. 1872. Act 1865, which extends the time and releases the conditions prescribed in a former statute in regard to the issuing of executions, may apply to judgments recovered before the passage of the act, without being liable to the objection of affecting vested rights.

Henschall v. Schmidtz, 50 Mo. 454.

⇐4. Actions and proceedings in which execution is authorized.

For cases from other jurisdictions, see other Key Number Digests.

⇐5. Judgment, decree, or order.

⇐6. —— Necessity in general.

An execution cannot issue except on a judgment or decree of a competent court, wherein the liability of the party is established.

Mo. 1822. Morrison v. Dent, 1 Mo. 246.

Mo. 1858. Bain v. Chrisman, 27 Mo, 293.

Mo. 1870. No execution can be issued in one state on the judgment of a court of another state without a new suit thereon in the tribunals of the former state.

Barney v. White, 46 Mo. 137.

Mo. 1885. Where a sheriff's deed is based on judgments which recite a notice, but not a citation, as provided by Rev.St. 1855, p. 1425, § 29, and the notice appears to be that contemplated in section 24, which is no citation for judgment at all, the deed is void.

Roberts v. Nelson, 86 Mo. 21.

Mo.App. 1942. An execution must be supported by a valid unsatisfied order, decree or judgment.

Woods v. Woods, 159 S.W.2d 320, 236 Mo.App. 855.

⇐7. —— Nature and form.

U.S.Mo. 1921. Rev.St. § 1041, 18 U.S.C.A. § 3565, providing that judgments for penalties may be enforced by execution in like manner as judgments in civil cases are enforced, applies to all judgments for penalties, whether recovered by civil or criminal proceedings.

Pierce v. U. S., 41 S.Ct. 365, 255 U.S. 398, 65 L.Ed. 697, modifying 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L. Ed. 1199.

Mo. 1849. Where a judgment of an inferior court is suspended by an appeal to a superior court, if the judgment is affirmed, execution issues from the inferior court, and the lien of its judgment remains good, notwithstanding the suspension of the judgment; but where the judgment is reversed, or a new judgment is rendered by the superior court, execution may issue from the superior court, or from the inferior court on the judgment of the superior court, and the lien of the former judgment is lost.

Meyer v. Campbell, 12 Mo. 603.

Mo. 1855. Judgment of an inferior court, affirmed in the Supreme Court, is a subsisting and valid judgment in the court where it was originally entered, and may be carried into execution accordingly.

Walter v. Tabor, 21 Mo. 75.

Mo. 1872. An execution may be issued on a judgment, the record of which has been mutilated or destroyed, without waiting to have it revived, as provided by Sess. Acts 1863–64, pp. 44, 45.

Strain v. Murphy, 49 Mo. 337.

Mo. 1904. The revival of a judgment by scire facias, as authorized by Rev.St.1899, § 4025, V.A.M.S. § 517.840 note, does not render the judgment revived functus officio, and create an entire new judgment, and hence it was no objection to an execution on a revived judgment that it was based on the original judgment.

Littlefield v. Ramsey, 80 S.W. 949, 181 Mo. 613.

Mo. 1932. Where default judgment was rendered against one defendant, and jury found adversely to codefendant, subsequent judgment against both *held* "final judgment," authorizing execution. Rev.St.1929, § 1077.

People's Bank of Glasgow v. Yager, 46 S.W.2d 585, 329 Mo. 767.

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Mo. 1940. No execution can issue directly upon foreign judgment, but such judgment must be sued upon like any other debt.
Cook's Estate v. Brown, 140 S.W.2d 42, 346 Mo. 281, 128 A.L.R. 1396.

Mo. 1942. An execution ordinarily issues as a matter of course on the rendition of a general judgment.
H. B. Deal & Co. v. Hamilton-Brown Shoe Co., 160 S.W.2d 719, 349 Mo. 275.

Mo.App. 1905. Where the finding of the jury was for the plaintiff separately on several counts of his petition, the statement of the amount of each count leaving nothing but the computation of different findings to be entered by the clerk, he had a right to treat it as one judgment, and issue an execution for the total sum.
Sheridan v. Forsee, 90 S.W. 120, 114 Mo. App. 588.

Mo.App. 1947. The compensation awarded amicus curiae in proceeding for pro forma decree for incorporation of educational association is a mere allowance which court has implied authority to make and charge against parties whose institution of proceeding made his appointment necessary for information of the court, and the order allowing his compensation and charging it against petitioners is in effect a judgment in his favor with right to sue out an execution for its enforcement. Mo.R.S.A. §§ 5436, 5437, V.A. M.S. §§ 352.010, 352.060.
In re Phi Fathers Educational Ass'n, 203 S.W.2d 885, 239 Mo.App. 1105.

⇐8. —— Validity.

Mo. 1847. A sale under a void judgment is void.
Sanders v. Rains, 10 Mo. 770.

Mo. 1871. A personal judgment against a married woman being entirely void, no title will pass to a purchaser at an execution sale thereunder.
Higgins v. Peltzer, 49 Mo. 152.

Mo. 1875. A judgment by default on an order of publication, without personal service or attachment, is void and an execution issued thereon is a nullity, and a purchaser at the execution sale obtains no title.
Cravens v. Moore, 61 Mo. 178.

Mo. 1888. Defendant in ejectment held under a sale of the lands on a judgment for taxes against the former owner, a bank. Plaintiff held under a deed from said bank. It appeared that the summons in the tax suit issued against the president of the bank, but issued and was served on him individually. *Held*, that there was no service on the bank, and the judgment and sale of the land thereunder were of no effect, and were not cured by order of court, at the instance of defendant in ejectment, amending the summons and its return after final judgment, and after the institution of the ejectment suit, without notice to defendant therein, or the sheriff.
Blodgett v. Schaffer, 7 S.W. 436, 94 Mo. 652.

Mo. 1908. An execution and sale under a void judgment are void, and are inoperative to transfer title.
Howell v. Sherwood, 112 S.W. 50, 213 Mo. 565.

Mo. 1938. An execution based on a void judgment is a nullity and an execution based on such a judgment should be quashed.
State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106.

Mo.App. 1876. One who has no interest in property levied on cannot complain because a judgment on which execution issued was void.
State, to Use of Doyle, v. Tobin, 1 Mo. App. 186.

Mo.App. 1892. Executions issued on a void judgment are a mere nullity, and not admissible in evidence.
Burr v. Mathers, 51 Mo.App. 470.

Mo.App. 1943. Judgment debtors have no just cause of complaint against issuance of an execution under judgment which was valid and binding.
State ex rel. Carnahan v. Dorris, 168 S.W.2d 167.

⇐9. —— Rendition and entry.

Mo. 1887. It is not essential to the validity of the records of courts that they should be signed by the judge, and a valid judgment will support an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time execution issued.
Fontaine v. Hudson, 5 S.W. 692, 93 Mo. 62, 3 Am.St.Rep. 515.

⇐10. —— Transcript of judgment of inferior court or justice of the peace filed in superior court.

Mo. 1872. A sale of real estate on an execution issued on a transcript from the justice's court, filed with the circuit court, passes a perfect title.
Waddell v. Williams, 50 Mo. 216.

Mo. 1882. Under the statute, after the lapse of three years from the rendition of a judgment in a justice's court, no execution

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can be issued on it until revived on a sci. fa., and until revived the transcript of such a judgment cannot be filed in the office of the clerk of the circuit court of the county after the lapse of three years, and the filing of such a transcript after the expiration of three years does not authorize the issuance of an execution.

Pears v. Goff, 76 Mo. 92.

Mo. 1890. Act 1874 makes it the duty of the judge to certify the judgments of the court of common pleas to the circuit court; and, until the contrary appears, it will be presumed that he performed his duty.

Bailey v. Winn, 12 S.W. 1045, 101 Mo. 649.

Mo. 1891. Under Rev.St.1879, § 2999, a transcript of a judgment of a justice from the date of its filing in the office of the clerk becomes equivalent to the judgment of the circuit court for many purposes, and executions issued thereon have the same force and effect as though issued upon a judgment rendered in the circuit court.

Jordan v. Surghnor, 17 S.W. 1009, 107 Mo. 520.

Mo. 1901. Where it appears that an execution issued by a justice was made returnable, and in fact was returned, in a less time than required by statute, a sheriff's deed given on a sale under an execution issued by the circuit court clerk on a transcript of the justice court proceedings, which merely recites the justice's judgment, the filing of the transcript, and the clerk's issuance of an execution on such transcript judgment, is insufficient to remedy such defect in the justice court execution.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Mo. 1907. Where there was a citation for renewal of a justice's judgment, but defendant made no appearance thereto, and a transcript of the revived judgment was filed in the circuit court, an execution and sheriff's deed thereon is void unless the original judgment is valid, since a citation to revive a justice's judgment is not a new suit, but merely ancillary to the old proceedings.

Hudson v. Wright, 103 S.W. 8, 204 Mo. 412.

Mo.App. 1884. The fact that the transcript of a judgment revived by a justice does not set out in what manner service was had, so as to show a compliance with law, is no ground to quash or recall the execution issued on the transcript.

Bauer v. Miller, 16 Mo.App. 252.

While a certificate of a justice as to the issuing and return of an execution, which is not a part of the transcript filed in the circuit court, is not admissible evidence against objection, yet it is, when admitted without objection, prima facie evidence, and justifies the issuance of an execution.

Bauer v. Miller, 16 Mo.App. 252.

Mo. 1901. A judgment was rendered in a justice court, which was revived ten years thereafter, and execution issued thereon and returned nulla bona, and five years after the return of the execution in the justice court a transcript of such judgment of revivor was filed in the office of the clerk of the circuit court and duly recorded, and execution issued thereon. *Held*, that the execution was void.

Bick v. Maddox, 87 Mo.App. 30.

Mo.App. 1907. Under Rev.St.1899, § 4022, Ann.St.1906, p. 2194, V.A.M.S. § 517.810 note, providing that execution cannot be issued by a justice after three years from the rendition of the judgment without revival, where a transcript of a judgment was not filed in the office of the clerk of the circuit court within three years of the date of its rendition, a suit in that court on the transcript, and for the purpose of reviving and renewing the judgment there, could not be maintained.

Bick v. Boyd, 100 S.W. 1128, 124 Mo. App. 58.

Mo.App. 1910. Under Rev.St.1899, § 4018, Ann.St.1906, p. 2191, V.A.M.S. § 517.770 note, authorizing the filing of certified transcripts of justices' judgments in the circuit court judgment dockets, and under section 4019, as amended by Act March 19, 1907, Laws 1907, p. 325, providing that such certified judgments shall be treated the same as circuit court judgments, such filing permits issuance of execution against personalty the same as upon circuit court judgments, and does not merely create a lien upon defendant's land.

McDonnell v. Nash Smith Tea & Coffee Co., 129 S.W. 479, 150 Mo.App. 24.

⇐11. Effect of motion for new trial or rehearing.

Mo. 1874. It is error to issue execution on a judgment before a motion for a new trial has been determined.

Stephens v. Brown, 56 Mo. 23.

Mo. 1895. The mere filing of a motion for a new trial will not operate per se to stay the issuance of an execution.

In re Craig, 32 S.W. 1121, 130 Mo. 590.

Mo.App. 1895. Where, in an action against an administrator with the will annexed by devisees, a third person inter-

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pleaded, claiming an interest in the fund adverse to plaintiffs, and, on judgment being rendered against the interpleader, he filed a motion for new trial and in arrest of the judgment, an execution issued in favor of plaintiff and against the administrator for the amount of the judgment while such motions were pending was properly quashed, since the interpleader, being the party aggrieved, had a right of appeal under Rev.St. 1889, § 2246, V.A.M.S. § 512.020, and the motions were a prerequisite to his right to appeal.

State ex rel. Mulvihill v. Kumpff, 62 Mo. App. 332.

⇐12. Effect of opening, vacating, or modifying judgment.

Mo.App. 1915. Where the judgment on which an execution rests is annulled, the execution falls.

Francis v. Francis, 179 S.W. 975, 192 Mo.App. 710.

Mo.App. 1940. Where circuit court set aside its prior order affirming justice's judgment for plaintiff on defendant's motion and, though hearing argument on plaintiff's motion for reconsideration and new trial of defendant's motion took no action thereon within term, plaintiff had no judgment in his favor on which he could sue out writ of execution.

Thompson v. Baer, 139 S.W.2d 1080.

Mo.App. 1952. Where decree upon which execution purported to rest was set aside and vacated by court within time permitted under law, execution fell with it.

Lohmann v. Lohmann, 246 S.W.2d 368.

⇐13. Effect of agreement for stay.

For cases from other jurisdictions, see other Key Number Digests.

⇐14. Effect of payment or satisfaction of judgment.

Mo. 1871. Where the amount due on a judgment is paid by a third party, as consideration for its assignment, and not in satisfaction of it, the assignee may sue out an execution on the judgment.

Fiske v. Lamoreaux, 48 Mo. 523.

Mo. 1874. A sale of land under a judgment, after satisfaction thereof, is void, and conveys no title.

Durfee v. Moran, 57 Mo. 374

Mo. 1884. Execution cannot issue on a judgment which has been satisfied by payment.

St. Francis Mill Co. v. Sugg, 83 Mo. 476.

Mo. 1887. A purchaser at a sale under execution takes no title to the land purchased, though bought in good faith, when the judgment on which the execution was issued had been satisfied prior to the sale.

Huber v. Pickler, 7 S.W. 427, 94 Mo. 382.

Mo. 1923. If a judgment or execution has been satisfied prior to the sheriff's sale thereunder, the sale is a nullity because the judgment and execution are extinguished by such satisfaction, and there cannot be an innocent purchaser in such case, it being immaterial that he did not know of the satisfaction before he purchased the property, and he secures no title by virtue of such purchase.

Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

Purchaser at a sheriff's sale is bound to take notice of how much of the judgment has been paid, and he cannot obtain title if the property was sold to satisfy a substantial sum which has already been paid on the judgment.

Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

Contention that, if the sheriff's sale of land could not be made for the supposed balance, owing on a foreign judgment, because of its satisfaction on the domestic judgment in Colorado, the sale could be made for the unpaid costs incurred in suing on the Colorado judgment in this state, *held* not tenable where the sale was not only made to pay the costs, but to pay the supposed balance, which included attorney's fees for which both the Missouri and Colorado judgments were rendered, and which were paid to the creditor in Colorado.

Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

Mo.App. 1938. A compromise and settlement between drainage district and landowners, of judgment for drainage taxes, was a bar to issuance of execution on judgment subsequent to such settlement. Mo.St.Ann. §§ 1597, 10828, pp. 1752, 3551, V.A.M.S. §§ 243.370, 528.530.

State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, 110 S.W.2d 865.

Drainage district which obtained a judgment for drainage taxes could not order execution after having compromised judgment with landowners against whom judgment was obtained. Mo.St.Ann. §§ 1597, 10828, pp. 1752, 3551, V.A.M.S. §§ 243.370, 528.530.

State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, 110 S.W.2d 865.

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Although attorney's fee for which judgment was rendered in suit by drainage district for drainage taxes, penalty, and attorney's fee was not paid to attorney, attorney was unauthorized to order an execution to be issued in the cause after district compromised judgment with landowners against whom judgment was obtained. Mo.St.Ann. §§ 1597, 10828, pp. 1752, 3551, V.A.M.S. §§ 243.370, 528.530.

State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County v. Juden, 110 S.W.2d 865.

⇐15. Particular forms of execution.

Mo.App. 1886. A seller of goods procured a judgment against the buyer for the purchase price thereof. This property was attached by other creditors. The court ordered the property sold, and then entered an order for the distribution of the proceeds by directing their payment to the seller. *Held*, that the order of the court for the distribution of the proceeds had the force of an execution, to which the property was subject as against the attaching creditors.

Bolckow Milling Co. v. Turner, 23 Mo. App. 103.

⇐16. Existence of or resort to other remedy.

For cases from other jurisdictions, see other Key Number Digests.

⇐17. Persons entitled to execution.

Mo.App. 1910. One of several joint debtors against whom judgment has been obtained, who has paid the debt and taken an assignment of the judgment, cannot collect it from his co-debtors by execution, and, an execution being issued, it should be quashed upon motion of a co-debtor.

Johnson v. Sherrodd, 125 S.W. 212, 141 Mo.App. 366.

Mo.App. 1918. Party in whose favor any judgment is rendered has exclusive right to have execution issued, and to give directions as to what shall be done thereunder.

People's Savings Bank v. McDowell, 204 S.W. 406.

Mo.App. 1938. None but parties to suit will be allowed to interpose in its control, and hence only drainage district which obtained a judgment for drainage taxes had right to order an execution issued on such judgment. Mo.St.Ann. §§ 1597, 10828, pp. 1752, 3551, V.A.M.S. §§ 243.370, 528.530.

State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S.W.2d 865.

Mo.App. 1939. As respects right to execution, only the parties to a suit can interpose in its control.

Bovard v. Bovard, 128 S.W.2d 274, 233 Mo.App. 1019.

⇐18. Persons against whom execution may issue.

For cases from other jurisdictions, see other Key Number Digests.

⇐19. Simultaneous and successive executions.

Mo.App. 1905. Where the jury found for plaintiff separately on each of the counts of his petition, the judgment being a mere money judgment at law, the issuance of separate executions on each count was not authorized.

Sheridan v. Forsee, 90 S.W. 120, 114 Mo. App. 588.

Mo.App. 1915. A judgment plaintiff is not limited to an original execution, but may procure further writs to obtain satisfaction.

McManus v. Burrows, 177 S.W. 671, 191 Mo.App. 594.

Mo.App. 1920. Under Rev.St.1900, § 2172, V.A.M.S. § 513.015, a judgment creditor is entitled to issue execution on each judgment obtained against the defendant.

Steffen v. American Surety Co. of New York, 224 S.W. 102.

II. PROPERTY SUBJECT TO EXECUTION.

⇐20-21.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐22. Public property and institutions.

D.C.Mo. 1933. Bondholder who recovered judgment against drainage district could not enforce judgment by execution against bank holding money collected by district for payment of bonds and deposited in bank.

Snower v. Hope Drainage Dist., 2 F. Supp. 931, reversed C.C.A., Groner v. U. S. ex rel. Snower, 73 F.2d 126.

Property of public corporation held for public uses and governmental purposes, is not subject to levy and sale under execution against corporation.

Snower v. Hope Drainage Dist., 2 F. Supp. 931, reversed C.C.A., Groner v. U. S. ex rel. Snower, 73 F.2d 126.

Mo. 1856. Property held by a trustee of a school district, organized under Act March 27, 1845, for the use of the school district, is

not subject to execution for a debt incurred by such trustee in building a school house for the district.

Allen v. Trustees of School Dist. No. 1, Tp. 53, Range 3, W., Pike County, 23 Mo. 418.

Mo. 1872. The swamp lands donated to the state, and by the state to the counties, under the various acts of the legislature, are held by the counties for school purposes only, and are not subject to levy of execution on a judgment against the county.

State ex rel. Robbins v. New Madrid County Court, 51 Mo. 82.

Mo. 1879. Public school property cannot be sold under a fi. fa., either general or special.

State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am.Rep. 498.

Mo. 1894. If, on the hearing of a motion to quash the levy of an execution against a county, it is made to appear that the property levied on was the public poorhouse and farm, the motion should be sustained, as under Rev.St.1889, § 4904, V.A.M.S. § 513.455, such property is exempt.

Catron v. Lafayette County, 28 S.W. 331, 125 Mo. 67.

Mo.App. 1938. An execution may not be run against the property of a school district or other political subdivision of the state.

State ex rel. Hufft v. Knight, 121 S.W.2d 762.

⇐23. Interests in public lands.

U.S.Mo. 1850. The title of a claimant of land in Missouri, under an imperfect Spanish title, after the presentation of his claim to the commissioners and before the issuing of a certificate by them under Act Cong. 1807, c. 36, 2 Stat. 440, was subject to seizure and sale on execution, according to the laws of Missouri; and the subsequent confirmation by the commissioners, and the issuing of a patent in the name of the original claimant, inured to the benefit of the purchaser at such sale.

Landes v. Brant, 51 U.S. 348, 10 How. 348, 13 L.Ed. 449.

Mo. 1887. Where the initiatory steps have been taken to acquire a patent, but the surveyor general has not returned the plat of the survey, as against any person but the United States the claimant has such an interest in the land as may be seized and sold on execution.

Hammond v. Johnston, 6 S.W. 83, 93 Mo. 198, error dismissed 12 S.Ct. 141, 142 U.S. 73, 35 L.Ed. 941.

Though at the time of an execution sale the surveyor general had not made a return to the recorder of land titles of the survey and plat made on application to locate a headright certificate, and consequently the government could have appropriated the land to other purposes at any time before such return to the recorder, yet the judgment debtor had an interest which could be sold on execution, his title having been made good, as against any party but the government, by his taking the initiatory steps to acquire a patent.

Mo. 1892. Block v. Morrison, 20 S.W. 340, 112 Mo. 343.

Mo. 1892. Davis v. Smith, 20 S.W. 344.

⇐24. Crops.

Mo.App. 1894. Under Rev.St.1889, § 4915, V.A.M.S. § 513.090, crops would be subject to seizure and sale under execution against a tenant, were it not for the existence of the landlord's lien.

Selecman v. Kinnard, 55 Mo.App. 635.

⇐25. Fixtures.

Mo.App. 1877. Where personal property was substantially attached to the realty, the property was not subject to levy under an execution issued by a justice of the peace.

State, to Use of Kidney, v. Marshall & Co., 4 Mo.App. 29.

Mo.App. 1925. Lessor's interest in fixtures in lessee's possession subject to execution.

R. Williams & Co. v. Farm & Home Savings & Loan Ass'n, 272 S.W. 1006, 217 Mo.App. 554.

⇐26. Rights under patents and copyrights.

For cases from other jurisdictions, see other Key Number Digests.

⇐27. Franchises and privileges.

Mo. 1867. The franchise of a corporation is not subject to levy and sale on execution against it.

Stewart v. Jones, 40 Mo. 140.

Mo.App. 1890. A sale of standing timber without deed is a mere license to cut and remove the trees, and the same being a mere personal trust in its nature, cannot be levied upon and sold under an execution.

Potter v. Everett, 40 Mo.App. 152.

⇐28. Corporate property used for public purpose.

Mo.App. 1879. The roadbed, rails, and right of way of a railroad company are not

For references to other topics, see Descriptive-Word Index

personal property, and liable as such to sale on execution.

Hart v. Benton-Bellefontaine Ry. Co., 7 Mo.App. 446.

⇐29. Corporate stock.

Mo. 1866. Stock in corporations is subject, under the act concerning executions, Rev.Code 1855, p. 742, §§ 23, 24, to a levy and sale on execution, though mortgaged.

Foster v. Potter, 37 Mo. 525.

Mo.App. 1902. Shares of corporate stock are neither chattels nor debts, but incorporeal personal property, separate and distinct from the certificates thereof, whose situs is in the state where the corporation was created; and hence they cannot be levied on under execution in another state in which it does business, unless under the laws of such state foreign corporations doing business therein are made domestic for the purpose of suit and service of process.

Caffery v. Choctaw Coal & Mining Co., 68 S.W. 1049, 95 Mo.App. 174.

Mo.App. 1912. Where a corporation organized under Arizona laws and licensed under Rev.St.1899, § 1025, V.A.M.S. § 351.590 note, established its principal office in Missouri, its corporate stock was subject to execution in Missouri.

Dean Rapid Telegraph Co. v. Howell, 144 S.W. 135, 162 Mo.App. 100.

⇐30. Membership or seat in exchange.

Mo.App. 1883. A membership in a stock exchange having a rule making the certificates of membership transferable, subject to the recommendation of a committee on membership and the approval of the board of directors, is a species of property not subject to ordinary execution, but which may be reached in equity, so as to respect the rules of the exchange and the rights of all parties interested.

Eliot v. Merchants' Exch., 14 Mo.App. 234.

⇐31. Particular estates or interests.

⇐32. —— Personal property.

Mo. 1860. A deed conveying "to the children and legal heirs of the grantor's brother a negro and certain personal property in fee simple forever," but upon condition that the granted property was "to remain with the wife of said brother, for the use and support of herself and the aforesaid children and heirs, so long as she should remain a widow," and providing that other children of said brother and wife should share equally with their brothers and sisters, and that at the death of the wife, "and not until then, shall an equal division take place among the brother's children and heirs," gives no interest to the wife which is subject to an execution against her.

McLaurine v. Monroe's Adm'rs, 30 Mo. 462.

⇐33. —— Real property.

C.C.A.Mo. 1908. Under Rev.St.Mo.1845, c. 61, § 14, Rev.St.Mo.1855, c. 63, § 17, an equitable vested remainder after the termination of a life estate created by a trust deed was subject to sale on execution against the remainderman.

Dunkerson v. Goldberg, 162 F. 120, 89 C.C.A. 120.

Mo. 1841. An improvement on public lands is not subject to execution.

Hatfield v. Wallace, 7 Mo. 112.

A pre-emption claim cannot be sold on execution, under Wag.St. p. 605, § 16, declaring vendible under execution all real estate whereof the defendant, or any person for his use, was seised in law or equity, at the time of the rendition of the judgment or thereafter.

Mo. 1873. Bray v. Ragsdale, 53 Mo. 170.

Mo. 1875. Cravens v. Moore, 61 Mo. 178.

Mo. 1882. Inasmuch as the statute provides that all real estate whereof a defendant is seised, either in law or in equity, shall be subject to seizure and sale under execution, the interest of one having an estate in remainder to the equitable fee in land was liable to be subjected to the payment of his debts.

White v. McPheeters, 75 Mo. 286.

Mo. 1903. Rev.St.1899, § 4339, V.A.M.S. § 451.260, providing that a husband's interest in property which his wife has acquired after marriage shall be exempt from execution for his debts during coverture, absolutely prohibits a levy and sale of a husband's contingent interest of curtesy during coverture for his debts.

Ball v. Woolfolk, 75 S.W. 410, 175 Mo. 278.

Mo. 1907. Under the express provisions of Rev.St.1879, §§ 2730, 2731, 2754, 2767, all the interest of a debtor in land whether legal or equitable, is subject to the lien of a judgment rendered in the same county, and is therefore subject to sale under an execution issued on such judgment.

Williams v. Lobban, 104 S.W. 58, 206 Mo. 399.

Mo. 1926. Contingent remainders, when clothed with their usual attributes, are subject to seizure and sale under execution.

Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1930. Contingent remainder could be sold under execution. Rev.St.1919, §§ 1623, 1625, V.A.M.S. §§ 513.010, 513.090.
Bock v. Whelan, 30 S.W.2d 607.

Mo. 1949. A contingent remainder in land may be sold under execution, and, where such a sale is made and contingency later happens, title vests in fee in execution purchaser.
Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W. 2d 714.

Mo.App. 1916. A widower's curtesy interest in the lands of his wife which were not their homestead is subject to execution for his debt.
Healey v. Tillberry, 183 S.W. 666, 192 Mo.App. 509.

⇐34. Property leased.

Mo. 1889. Under Rev.St.1889, § 6368, V. A.M.S. § 441.030, providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest, or any part thereof, to another without the written consent of the landlord, such interest cannot be passed by sale under legal process.
Holliday v. Aehle, 12 S.W. 797, 90 Mo. 273.

⇐35. Property pledged.

Mo. 1852. A pledgor of personal property in possession of the pledgee has no interest therein subject to execution.
Sexton v. Monks, 16 Mo. 156.

Mo. 1912. The general title of a pledgor of goods and chattels is vendible, and may be levied upon by execution or attachment subject to the pledgee's lien.
Milliken-Helm Commission Co. v. C. H. Albers Commission Co., 147 S.W. 1065, 244 Mo. 38.

Mo.App. 1918. The interest of the pledgor of personal property in the possession of the pledgee is not subject to execution.
Evens & Howard Fire Brick Co. v. Gammon, 204 S.W. 832.

⇐36. Property mortgaged or otherwise incumbered.

⇐37. —— Personal property.

D.C.Mo. 1915. After condition broken, and a chattel mortgagee has assumed possession, the mortgagor's equity of redemption is not subject to levy in Missouri.
In re Moark-Nemo Consol. Mining Co., 219 F. 340.

The interest of a mortgagor of personal property in the hands of the mortgagee is not subject to seizure under execution against the mortgagor.
Mo. 1852. Sexton v. Monks, 16 Mo. 156.
Mo.App. 1876. Spalding v. Taylor, 1 Mo.App. 34.
Mo.App. 1876. Mechanics' Sav. Inst. v. Finn, 1 Mo.App. 36.

Mo. 1843. Under Execution Law, §§ 18, 43 the possession of mortgaged chattels by the mortgagor, with the consent of the mortgagee, and determinable at will, is not the subject of sale on execution.
King v. Bailey, 8 Mo. 332.

Mo. 1852. The equitable interest of a mortgagor in possession of personal chattels after forfeiture of the mortgage is not subject to levy and sale on execution. The sheriff must actually seize the property on a fi. fa. before making a sale.
Yeldell v. Stemmons, 15 Mo. 443.

Mo. 1866. The equity of redemption of mortgaged chattels may be sold on execution.
Foster v. Potter, 37 Mo. 525.

Mo.App. 1877. Right of redemption of chattels by mortgagor as subject of levy and sale on execution. See,
Rodgers v. Lidwell, 3 Mo.App. 600, memorandum.

Mo.App. 1887. Until the possessory right of the mortgagor ceases, his interest in the chattels covered by the mortgage is the subject of seizure and sale under an execution at the instance of his creditors; but his equity, after condition broken, is not subject to such seizure.
State, to Use of McGrath, v. Carroll, 24 Mo.App. 358.

Mo.App. 1888. The interest of a mortgagor of personal property is subject to execution only when he has a definite and determined right of possession. Possession during the pleasure of the mortgagee will not suffice.
Merchants' Nat. Bank v. Abernathy, 32 Mo.App. 211.

Mo.App. 1892. Where a chattel mortgage, given to secure the payment of certain drafts, provided that the mortgagor should retain possession until default was made in the payment of the drafts, the mortgagor had, prior to the maturity of any of the drafts, an interest in the property which was subject to execution.
Springate, to Use of Nelson Distilling Co., v. Koppelman Furniture Co., 51 Mo.App. 1.

Mo.App. 1894. The equity of redemption of mortgaged chattels may be sold, before condition broken, on execution.
Pollock v. Douglas, 56 Mo.App. 487.

Mo.App. 1894. Where a chattel mortgage recites that in case of sale or disposal, or attempt to sell or dispose of the mortgaged property, the mortgagee might take the property into possession, an attempt to sell the property under execution was sufficient to work a default; and hence a claim to the property, made to the constable who had levied on the property, was made after default, and no right remained in the mortgagor subject to sale.

State ex rel. Pape Bros. Moulding Co. Althaus, 60 Mo.App. 122.

Mo.App. 1897. A mortgagor, having the right of possession of the mortgaged chattels until some condition of the mortgage is broken, has an interest therein that may be levied on under execution against him.

State ex rel. Jones v. White, 70 Mo.App. 1.

Mo.App. 1902. Where a note secured by a mortgage on a horse was past due, though the mortgagor was yet in possession, he had no interest subject to execution, the legal title and right of possession being in the mortgagee.

Burge ex rel. Babcock v. Hunter, 67 S.W. 697, 93 Mo.App. 639.

Mo.App. 1932. So long as mortgagor's possessory right remains, his interest in mortgaged property is subject to sale under execution.

Green v. Powell, 46 S.W.2d 915.

After condition broken, chattel mortgagor's right of redemption becomes mere equity, not subject to execution.

Green v. Powell, 46 S.W.2d 915.

⇐38. —— Real property.

Mo. 1843. An equity of redemption in mortgaged lands could, before Rev.Laws 1825, be sold on execution at law, under Ter. Laws 1807, p. 120, c. 38, §§ 42, 45, and the sixty-sixth section of the act concerning judicial proceedings. Geyer's Dig. p. 267.

McNair v. O'Fallon, 8 Mo. 188.

Mo. 1844. A. mortgaged land to B., who obtained a judgment of foreclosure, but took out no execution, and agreed in writing to convey to A. an adjoining lot whenever A. should redeem the mortgage. Three years afterwards B. purchased A.'s equity of redemption at a sheriff's sale, on an execution in favor of C. Ten years afterwards A. filed his bill to redeem. *Held*, that the interest of A. in the land after the foreclosure was an equity of redemption, and, as such, salable on execution. Geyer's Dig. pp. 307, 308; Old Rev.Code, pp. 593–595.

Benton v. O'Fallon, 8 Mo. 650.

Mo. 1890. Under Rev.St.1879, § 2354, an equity of redemption is subject to sale on execution against the party holding the equity.

Holloway v. Holloway, 15 S.W. 536, 103 Mo. 274.

Mo. 1949. Equity of redemption in realty, subject to deed of trust, was salable under execution.

Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W. 2d 714.

Mo.App. 1903. Where a mortgagor took up the mortgage with money furnished by a third party, and thereafter turned the mortgage over as collateral security for a loan, he had an equity in the mortgaged premises which might be subjected to the payment of his debts, subject to the prior lien of the holder of the mortgage.

Bracken v. Milner, 73 S.W. 225, 99 Mo. App. 187.

Mo.App. 1940. A "mortgage" or "deed of trust" is but chattel interest, right to money payable by mortgagor passes to deceased mortgagee's personal representative, whose receipt therefor is good against mortgagee's heir, mortgagor's wife, but not mortgagee's wife, is dowable, mortgaged estate may be sold to pay mortgagor's debts, but not for mortgagee's debt, debt secured cannot be separated from mortgage, and mortgagee after forfeiture for breach of condition, may maintain ejectment against mortgagor to recover estate so that mortgagee may have benefit of rents and profits therefrom.

Wakefield v. Dinger, 135 S.W.2d 17, 234 Mo.App. 407, transferred 130 S.W.2d 490.

⇐39. Rights or interests secured by liens.

Mo. 1920. A mortgage lien cannot, in and of itself apart from the debt, be assigned, nor levied upon or sold on execution.

Missouri Real Estate & Loan Co. v. Gibson, 220 S.W. 675, 282 Mo. 75.

⇐40. Equitable estates or interests in general.

An equitable interest in personal property cannot be sold on execution.

Mo. 1852. Yeldell v. Stemmons, 15 Mo. 443.

Mo. 1852. Boyce's Adm'r v. Smith's Adm'r, 16 Mo. 317.

Mo. 1887. Under 1 Ter.Laws, p. 120, § 45, an equitable interest in real estate could be seized and sold on execution.

Hammond v. Johnston, 6 S.W. 63, 93 Mo. 198, appeal dismissed 12 S.Ct. 141, 142 U.S. 73, 35 L.Ed. 941.

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Mo. 1896. Act June 28, 1821, 1 Ter. Laws, p. 778, provided that, on a sale of land under execution, the sheriff should deliver to the purchaser a certificate of purchase; that the debtor might redeem from the sale within 2½ years; that, if he failed to do so, creditors might redeem within three years; and that, if no redemption were made, the sheriff should execute a deed to the purchaser. This law was repealed by Act Jan. 11, 1822, with a provision that it should not render invalid any proceedings had under the former act before the repeal thereof. Land was sold under execution August 24, 1821. The debtor's equity of redemption was sold to other creditors after the repeal of Act June 28, 1821. Before the expiration of the time for redemption, the purchaser at the first sale quitclaimed all of his interest in the premises to the purchasers of the equity of redemption. *Held*, that the equity of redemption was vendible on execution, and hence its purchasers acquired a completed title by the quitclaim deed.

Hammond v. Horton, 37 S.W. 825, 137 Mo. 151, error dismissed 18 S.Ct. 942, 169 U.S. 734, 42 L.Ed. 1215.

Mo. 1926. Equitable life estates, when clothed with their usual attributes, are subject to seizure and sale under execution.

Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

⊂=41. Trust estates.

Mo. 1838. Where the execution debtor redeems land sold on the execution with his own money, but the deed is given to other persons to secure them for debts due them by the execution debtor, such debtor has a resulting trust after the satisfaction of the debts secured, which may be taken on execution.

Evans v. Wilder, 5 Mo. 313.

Mo. 1846. A. purchased stock with the funds of B., and for her, but had it entered in his own name; stating at the time the real owner, and never setting up any claim for himself to it. There was no pretense of an attempt to defraud the creditors of B. *Held*, that the stock could not be subjected to the payment of the debts of A., and that, if this was attempted, equity would interfere to prevent it.

Anderson v. Biddle, 10 Mo. 23.

Mo. 1867. Where, under a deed by the grantor constituting himself a beneficiary, he, as a cestui que trust, has no seisin or possession of the land, and no power to dispose of any estate therein, or to enjoy the occupancy or collect the rents, nor any power to call upon the trustee to execute any conveyance to himself, he has no estate or interest in the land which is vendible under an execution within Rev.Code 1855, p. 740, §§ 17, 73, providing that all real estate whereof the defendant or any person for his use is seised in law or equity is subject to sale on execution, and that real estate includes "all estate and interest in lands, tenements, and hereditaments."

McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295.

Mo. 1872. Where a debtor's brother-in-law bought up his debts of Eastern creditors for 25 cents on the $1, with which he purchased the debtor's stock of goods, putting in the debts at full value, the resulting trust thereby arising in favor of the debtor for the benefit of his creditors may be sold under execution.

Bobb v. Woodward, 50 Mo. 95.

Mo. 1894. A sale under execution of land to which the execution debtor has only the legal title vests no title in the purchaser.

Morrison v. Herrington, 25 S.W. 568, 120 Mo. 665.

Mo. 1920. Where the judgment debtor merely held the legal title as trustee, it does not pass on execution sale.

Sorrell v. Bradshaw, 222 S.W. 1024.

Mo.App. 1912. Trust property cannot be reached in an action at law for damages for breach of an executory contract, and it can only be reached in equity.

Markel v. Peck, 151 S.W. 772, 168 Mo. App. 358.

Mo.App. 1917. Where a cestui que trust has an absolute right to the funds of the trust or its avails, or where it is his absolute property, and may be alienated, such property may be sold under execution.

First Nat. Bank v. Burns, 199 S.W. 282.

Mo.App. 1940. Where deed created spendthrift trust for creator's son for life, son's only interest was that of an equitable life estate in income or its equivalent and he had no interest which was subject to be seized and sold under execution, and purchaser at execution sale acquired no right, title or interest in property by virtue of sheriff's deed.

Gentemann v. Dyer, 140 S.W.2d 75, transferred 132 S.W.2d 1022.

⊂=42. Interests under contracts in general.

Mo. 1835. One who purchased land at an administrator's sale, receiving a bond for title on payment of the purchase price, had no interest or title, before payment, which could be sold under execution.

Bartlett v. Glascock, 4 Mo. 62.

For references to other topics, see Descriptive-Word Index

Mo. 1852. When the parties have bound themselves by agreement, the one to convey land and the other to pay for it, courts of equity, by virtue of Rev.St.1845, § 14, concerning executions, recognize an interest in the land in the purchaser that may be sold on execution; but it is otherwise if, under the agreement, no money has been paid by him who may become the purchaser, and he is not under any actual obligation to pay.

Brant v. Robertson, 16 Mo. 129.

Mo. 1853. Where A. conveyed land to B., and B. at the same time executed a title bond to A., binding himself to reconvey the land to A. on receipt of the amount of the purchase money on or before a certain date, and A. on that date made a tender of the money, it was *held* that he thereby acquired an interest in the property which could be sold on execution, so as to vest the title in the purchaser as against B.

Anthony v. Rogers, 17 Mo. 394.

Mo. 1858. Where land is sold and a title bond given by the vendor, the interest of the vendee may be seized and sold under an execution against him.

Lumley v. Robinson, 26 Mo. 364.

Mo. 1872. Where a purchaser of real estate has paid therefor in full, but has not yet received a deed, the vendor is seised to his use, and the purchaser's title is subject to attachment and sale under execution.

Neef v. Seely, 49 Mo. 209.

Mo. 1873. Land paid for and taken possession of by a purchaser is vendible on execution, although by mistake the deed describes other land.

Morgan v. Bouse, 53 Mo. 219.

Mo. 1884. An agreement made without consideration to sell land to another, but which imposes no obligation on the latter to accept the conveyance or pay the purchase money, transfers no estate in the property which can be subjected to sale on execution.

Quell v. Hanlin, 81 Mo. 441.

⊂⇒43. Interests under insurance policies.

Mo.App. 1928. Life policy *held* not subject to barter and sale as chattel at public sale on execution after attachment. Rev.St. 1919, §§ 1743, 1754, 1758, V.A.M.S. §§ 521.240, 521.300, 521.340.

Industrial Loan & Investment Co. v. Missouri State Life Ins. Co., 3 S.W.2d 1046, 222 Mo.App. 1228.

⊂⇒44. Interests of heirs or distributees.

For cases from other jurisdictions, see other Key Number Digests.

⊂⇒45. Interests of devisees or legatees.

Mo. 1852. The statute up to December 30, 1826, authorized a levy on and a sale of the lands of the testator for the payment of his debts, though he had devised them in trust for the benefit of an infant child.

Carson v. Walker, 16 Mo. 68.

Mo. 1945. The interest of a legatee under will was subject to execution and could be sold as the property of the legatee, subject to the debts of the ancestor.

Shepard v. Shepard, 186 S.W.2d 472, 353 Mo. 1057.

⊂⇒46. Money of debtor.

Mo. 1878. An execution may be levied on money.

State ex rel. Kansas City Nat. Bank v. Boothe, 68 Mo. 546.

Mo.App. 1907. A constable who, having an execution, grabs a package of currency held in one hand by the debtor who is counting the money, is not guilty of a trespass.

Richards v. Heger, 99 S.W. 802, 122 Mo. App. 512.

⊂⇒47-49.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⊂⇒50. Ownership or possession of property.

⊂⇒51. —— In general.

Mo. 1877. Where a husband and wife became seised in entirety of an undivided part of certain premises, a creditor of the husband was entitled to recover out of the husband's interest, and hence the husband's interest was subject to sale on execution under a judgment recovered by such creditor, though the debtor's wife, surviving him, takes the land, notwithstanding 2 Wag.St. p. 935, § 14, since the statute was evidently designed to prevent a sale under execution against the husband where the wife holds the fee in her own right.

Hall v. Stephens, 65 Mo. 670, 27 Am.Rep. 302.

Mo.App. 1876. Execution defendant *held* entitled to show amount of property owned by him. See,

State, to Use of Henderson, v. Taylor, 2 Mo.App. 600, memorandum.

Mo.App. 1882. Right of execution purchaser to land purchased with debtor's wife's money. See,

Haskell v. Whyte, 12 Mo.App. 585, memorandum.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1895. In an action against a corporation for conversion of shares of its own stock, which plaintiff had purchased at sale under an execution issued against another person than the one in whose name the stock stood upon the books of the corporation, plaintiff could not recover without affirmative proof that the execution defendant was the real owner of the stock.

Appleman v. American Sporting Goods Co., 64 Mo.App. 71.

Mo.App. 1924. That mortgagee holding title to automobiles taken in part payment for other cars sold by mortgagor with mortgagee's permission transferred title to mortgagor and took back mortgage, with knowledge of levy of execution thereon under judgment against mortgagor did not validate levy as to mortgagor's after-acquired title, in view of Rev.St.1919, § 1658, V.A.M.S. § 513.150. Per Arnold, J.

First Nat. Bank v. Polk, 263 S.W. 504.

Mo.App. 1935. As regards question whether there has been change of possession of personal property, precluding lawful levy under execution against transferor, actual and continued change of possession must be open, notorious, and unequivocal, such as to apprise community or those accustomed to deal with parties that goods have changed hands.

Schell v. F. E. Ransom Coal & Grain Co., 79 S.W.2d 543.

⇐52. —— Adverse possession or claim.

Mo. 1875. The right of an execution debtor to real property held adversely to him may be sold under execution.

Rogers v. Brown, 61 Mo. 187.

⇐53. —— Property or rights conveyed or assigned.

Mo. 1876. The grantor of land, where the conveyance was procured by fraud, has, under Wag.St. p. 605, § 16, an interest which may be sold under execution.

Street v. Goss, 62 Mo. 226.

Mo. 1881. Act March 31, 1874, does not authorize the levy of an execution for the purchase price of property on the property in the hands of a purchaser from the original vendee.

Haworth v. Franklin, 74 Mo. 106.

Mo. 1932. Where land was free from lien of judgment for costs, and grantor had right to convey land to wife and daughter, he had no interest in it after conveyance and it could not be sold under execution against him. Rev.St.1929, § 1103, V.A.M.S. § 511.350.

Klaber v. Booth, 49 S.W.2d 181.

Mo. 1943. Under deed conveying land to grantor's wife for life, with remainder in fee to her bodily heirs, her son, subsequently born, was not "vested remainderman", but "contingent remainderman", and life estate and remainder were not "merged" in fee-simple title when wife conveyed life estate to such son, so that execution sale of wife's interest in land to bank for satisfaction of its judgment against wife and others was not ineffectual as directed only against wife's life estate theretofore fused with remainder.

Bullock v. Peoples Bank of Holcomb, 173 S.W.2d 753, 351 Mo. 587.

Mo.App. 1889. Under Rev.St.1879, § 3295, the husband retains no interest in land vendible in execution, where he had made a valid conveyance thereof to his wife.

Good v. Merhowitz, 35 Mo.App. 658.

Mo.App. 1927. Deed recorded before execution sale will defeat title acquired at such sale. Rev.St.1919, §§ 2199, 2200, V.A.M.S. §§ 442.390, 442.400.

Boland v. Kirkwood Trust Co., 298 S.W. 1052, 220 Mo.App. 1219.

⇐54. —— Property in custody of agent or depositary.

Mo.App. 1924. Where mortgagor, with mortgagee's permission, sold mortgaged automobiles, taking used cars in part payment, and, as agreed, paid the cash proceeds to mortgagee, and reported to it the taking of the used cars, such cars did not belong to mortgagor, and levy thereon as his property was invalid. Per Arnold, J.

First Nat. Bank v. Polk, 263 S.W. 504.

⇐55. Property in custody of the law.

Money in the hands of an officer, received on an execution, is not liable to be levied upon as the property of the creditor in the execution.

Mo. 1850. Ex parte Fearle, 13 Mo. 467, 53 Am.Dec. 155.

Mo. 1878. State ex rel. Kansas City Nat. Bank v. Boothe, 68 Mo. 546.

Mo. 1874. Where an attachment suit was commenced in a court of common pleas in October, 1870, and the property of the defendant was taken into custody by the sheriff under the writ, and in February, 1871, another suit was begun, the sheriff cannot seize the attached property under a special execution issued to satisfy the judgment in that suit.

Metzner v. Graham, 57 Mo. 404.

Mo. 1878. A right to a sum of money in the hands of a sheriff can no more be seized

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than a right to a sum of money in the hands of any other person.

State ex rel. Kansas City Nat. Bank v. Boothe, 68 Mo. 546.

Mo. 1883. A sheriff seized personal property under an execution. A third person claimed to own it and replevied the same. Pending the replevin suit the sheriff relevied on and seized the property by virtue of executions against the same debtor. *Held*, that the levy pending the replevin suit was improper; property in legal custody not being subject to seizure under other judicial process.

Bates County Nat. Bank v. Owen, 79 Mo. 429.

Mo. 1930. Property is in "custody of law" when it has been lawfully taken by authority of legal process, and remains in possession of public officer or court officer empowered by law to hold it.

Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

Where trustees were appointed under stipulations made part of judgment, and they received assets from receiver, such assets were in custody of law when levied upon.

Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

Where property was in legal custody of division No. 2 of circuit court, division No. 1 could not determine whether purposes for which trustees were appointed had been accomplished.

Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

Property of judgment debtor in legal custody of division No. 2 of circuit court could not, without court's leave, be reached by execution issued out of division No. 1.

Allan v. Hargadine-McKittrick Dry Goods Co., 28 S.W.2d 670, 325 Mo. 400.

Mo.App. 1886. Property in the hands of a sheriff under a writ of attachment cannot be levied on by another officer under an execution in his hands.

Hombs v. Corbin, 20 Mo.App. 497.

Property which is, at the time of the issuance of execution, in possession of an officer acting under a writ of attachment, becomes, on dissolution of the attachment, subject to the lien of the execution, as if it had never been attached.

Hombs v. Corbin, 20 Mo.App. 497.

Rev.St. § 3017, providing that the execution, from the time of the delivery to the constable, shall be a lien on the property of defendant, but not upon any property exempt by law from execution sale, refers to the exemption made by the statutes in favor of debtors, and property in custodia legis is not exempt within the meaning of this statute.

Hombs v. Corbin, 20 Mo.App. 497.

Mo.App. 1886. Where defendant in attachment retained possession of the property by giving a forthcoming bond, the property continued in the possession of the law and was not subject to a levy.

Fleming v. Clark, 22 Mo.App. 218.

Mo.App. 1886. Under Rev.St.1879, § 2353, providing that personal property shall be subject to execution on a judgment against the purchaser for the purchase price thereof, except in the hands of an innocent purchaser for value without notice, personal property held under an attachment is liable to seizure under an execution on a judgment against the purchaser for the purchase price of the property, for attaching creditors cannot be deemed innocent purchasers.

Bolckow Milling Co. v. Turner, 23 Mo. App. 103.

Mo.App. 1891. Property held under process by one officer may be levied upon by another officer upon process from a different court, or may be made subject to other writs subsequently placed in the hands of the officer making the first levy; but there can be no actual seizure under a subsequent levy, as the property is already in custodia legis, and the subsequent levy is only available to hold the surplus after the satisfaction of the prior writ.

State ex rel. Frank v. Curran, 45 Mo. App. 142.

⚖56. Joint or several property.

Mo. 1870. The interest of a partner is subject to seizure by private creditors, and the measure of his interest can be determined in a trial of a replevin suit for the property.

Rapp v. Vogel, 45 Mo. 524.

⚖57-58.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

⚖59. Jurisdiction to issue and control in general.

Mo. 1828. The supreme court may award execution to carry into effect its decisions.

McNair v. Lane, 2 Mo. 57.

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Mo. 1941. Executions are based on judgment rendered by court, but are not issued by court.

State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109, 348 Mo. 37.

⚖60. Authority of particular courts and officers.

Mo. 1834. The clerk of the circuit court has authority to issue an execution on a transcript of a judgment of a justice of the peace filed in his office.

Coonce v. Munday, 3 Mo. 373.

Mo. 1884. Independent of Rev.St.1879, § 2611, the probate court has jurisdiction to enforce by execution a judgment rendered by it against a guardian on final settlement of his accounts, since by Gen.St.1865, p. 538, c. 133, § 17, all courts have power to issue such writs as may be necessary to the exercise of their respective jurisdictions.

Yeoman v. Younger, 83 Mo. 424.

Mo. 1892. Act March 2, 1874, creating courts of common pleas, provides, by section 3, that "the judgment of said court shall be a lien upon real estate, and in all other respects have the same force and effect as judgments of the circuit court, after a transcript thereof shall be filed in the circuit clerk's office"; and it is made the duty of the judge to file a certificate of all judgments in the circuit court, "setting forth briefly the name of the plaintiff and defendant and the amount and date of judgment." Section 8 provides that, "where real estate shall be levied on by virtue of an execution on any judgment or decree of said court," the sale thereof shall be made "during some term of said court," and be conducted as sales under execution issued from the circuit court. *Held*, that execution on a judgment in the court of common pleas must be issued from that court rather than from the circuit court; and a sale of real estate thereon is valid as between the parties to the action, though no transcript of the judgment was filed in the circuit court.

Bailey v. Winn, 20 S.W. 21, 113 Mo. 155.

Mo. 1945. Issuance of execution is a ministerial act, performed by the clerk, even in court actions. Mo.R.S.A. § 1316, V.A.M.S. § 513.015.

State ex rel. Keitel v. Harris, 186 S.W. 2d 31, 353 Mo. 1043.

⚖61. Issuance on transcript of judgment of inferior court or justice of the peace.

⚖62. —— In general.

Mo. 1866. The transcript of a justice's judgment rendered in Mason township must be filed in the clerk's office of both the Marion circuit court and the Hannibal court of common pleas before an execution can issue from the latter court against land, under the direct provisions of Laws 1850–51, p. 208, § 3.

Carr v. Youse, 39 Mo. 346, 90 Am.Dec. 470.

Mo. 1868. The filing of the transcript of a justice's judgment rendered in Mason township in the office of the clerk of the Marion circuit court was, by the act establishing the Hannibal court of common pleas, made a condition precedent to the authority of the latter court to issue an execution thereon.

Carr v. Youse, 43 Mo. 28.

Mo. 1895. After the circuit court has finally dismissed an appeal from the judgment of a justice's court, execution may be issued on a transcript of the judgment filed in the circuit court.

McAnaw v. Matthis, 31 S.W. 344, 129 Mo. 142.

Mo. 1907. Ann.St.1906, § 4018, authorizes the filing of a transcript of a justice's judgment in the office of the clerk of the circuit court; and section 4019 declares that every such judgment, from the time of filing the transcript, shall be a lien on real property and may be enforced in the same manner as judgments of circuit courts, but that no execution "shall be sued out" of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, and returned nulla bona, etc. *Held*, that where, prior to the filing of a transcript of a justice's judgment, an execution had been issued and returned nulla bona, the clerk of the circuit court, after the filing of such transcript, was authorized in vacation to issue an execution on the same without any proceedings in the circuit court.

Scharff v. McGaugh, 103 S.W. 550, 205 Mo. 344.

Mo. 1931. Execution issued out of circuit court on justice of peace judgment rendered in another county was nullity. Rev.St. 1919, § 1597, V.A.M.S. § 511.480.

Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

Mo.App. 1884. Sufficiency of showing. See,

Klein v. Wielandy, 15 Mo.App. 581, memorandum.

⚖63. —— Previous issue and return of execution in lower court.

Mo. 1834. Section 30 of the act respecting justices' courts, providing that any per-

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son obtaining a judgment before a justice of the peace for any sum above $10 may file a transcript thereof in the office of the clerk of the circuit court of the county where the judgment was rendered, which shall, from the time of the filing, constitute a lien on the real estate as judgments rendered in the circuit court, and declaring that no execution shall issue out of the clerk's office until an execution shall have been issued by the justice and the constable shall have returned that no goods or chattels of defendant are to be found, authorizes the clerk of the circuit court to issue an execution in case the constable returns that no goods or chattels of the defendant are to be found, notwithstanding the fact that the section does not say that an execution shall issue.

Coonce v. Munday, 3 Mo. 373.

Mo. 1835. Under an act authorizing the issuance of execution by the circuit court on a justice's transcript of judgment filed therein showing that execution has been returned "No goods found," a justice's transcript showing that execution was returned not satisfied by a levy under which a certain sum was realized, and which does not show that the debtor had no more goods out of which the balance could be made, is insufficient to authorize execution from the circuit court.

Burk v. Flurnoy, 4 Mo. 116.

Mo. 1838. A certified copy of an execution and return, issued on a judgment of a justice of the peace, is legal evidence of the fact of the issuance and return of such execution, sufficient to authorize the clerk of the circuit court to issue an execution on the transcript of the judgment.

Wineland v. Coonce, 5 Mo. 296, 32 Am. Dec. 320.

Before the clerk of the circuit court can issue an execution on a transcript of a judgment from a justice of the peace, execution must have been issued by the justice of the peace, returned nulla bona, and a certified copy of such execution and return filed in the circuit court.

Wineland v. Coonce, 5 Mo. 296, 32 Am. Dec. 320.

The judgment creditor may file a transcript of a judgment of a justice of the peace in the office of the clerk of the circuit court without having execution issued by the justice and returned nulla bona.

Wineland v. Coonce, 5 Mo. 296, 32 Am. Dec. 320.

Mo. 1847. Under the statute entitled "An act for the better security of mechanics, in the city and county of St. Louis", Sess. Acts 1842–43, where the lien is filed and a judgment obtained before a justice, the clerk can issue an execution without a return of nulla bona on an execution issued by the justice.

Illingworth v. Miltenberger, 11 Mo. 80.

Mo. 1848. Where the transcript of a record showed that an execution had been issued by a justice of the peace and returned nulla bona, it was *held* to be sufficient evidence to authorize the issue of execution by the clerk of the circuit court.

Crowley v. Wallace, 12 Mo. 143.

Mo. 1852. The provision against issuing an execution in the circuit court until an execution shall have been issued by the justice and returned nulla bona requires that the evidence of such execution, which had issued and been returned, shall exist in the office of the circuit court.

Murray v. Laften, 15 Mo. 621.

A certificate of a justice, stating that execution had been issued to a constable of the township in which the defendant resided, the time of the return, and the return itself, by which it appeared that no property was found to levy on, is sufficient to authorize the clerk of the circuit court to issue execution on the transcript of the judgment of the justice filed in his office.

Mo. 1867. Ruby v. Hannibal & St. J. R. Co., 39 Mo. 480.

Mo. 1867. Parker v. Hannibal & St. J. R. Co., 39 Mo. 484.

Mo. 1870. Under Rev.Code 1855, p. 961, §§ 16, 17, providing that on the transcript of a justice's judgment no execution shall issue from the circuit court until an execution has been issued by the justice and returned nulla bona, an execution can issue from the circuit court, if the issuance of the execution by the justice and the nulla bona return appear in the transcript, though the record does not contain a certified copy of the judgment with the return thereon.

Burke v. Miller, 46 Mo. 258.

Mo. 1872. Where land was sold under an execution issued from the circuit court on a transcript filed in the justice's court, it is not essential to the validity of the execution in the circuit court that the transcript embrace a copy of the execution by the justice and the nulla bona return of the constable, where such facts are recited in the sheriff's deed.

Waddell v. Williams, 50 Mo. 216.

Mo. 1875. A sale of land under execution issued on a transcript from a justice's court is not void, collaterally, by reason of the fact that the transcript was founded up-

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on a constable's return made in less than 90 days from date of the execution.

Whitman v. Taylor, 60 Mo. 127.

Mo. 1888. Under Rev.St. § 2999, it is only when defendant is a resident of the county that a return of nulla bona is a condition precedent to the issuance of an execution from the circuit court on a transcript of the judgment.

Sachse v. Clingingsmith, 11 S.W. 69, 97 Mo. 406.

Mo. 1891. Under Rev.St.1879, § 2099, which provides that no execution on a justice's judgment "shall be issued out of the court where the transcript is filed, if the defendant is a resident of the county," until execution shall have been issued by the justice and returned unsatisfied, the issue of execution by the justice is not a condition precedent to the issue of one by the clerk of the court in which the transcript is filed if the defendant therein is a nonresident of the county.

Jordan v. Surghnor, 17 S.W. 1009, 107 Mo. 520.

Mo. 1894. Under Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, providing that no execution shall issue from the circuit court on a transcript from a justice, where defendant is a resident of the county, unless an execution from the justice has been issued and returned nulla bona, an execution issued from the circuit court without such prior return is valid if the defendant is a nonresident at the time of issuance.

Huhn v. Lang, 27 S.W. 345, 122 Mo. 600.

There is no presumption from the issuance of an execution by a clerk of a circuit court on the transcript of a judgment by a justice, that a return of nulla bona was made to the judgment in justice's court, as required before execution on the transcript may issue.

Mo. 1896. Langford v. Few, 47 S.W. 927, 146 Mo. 142, 69 Am.St.Rep. 606.

Mo. 1901. Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Mo. 1898. A failure to comply with the requirement of Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, that before issuing an execution on a transcript from a judgment in justice court a return of nulla bona shall be made to an execution thereon in justice court, is not a mere irregularity, but the failure is fatal to recovery in ejectment by one claiming title under execution issued on the transcript.

Langford v. Few, 47 S.W. 927, 146 Mo. 142, 69 Am.St.Rep. 606.

Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, provides that no execution shall be sued out of the court where the transcript of a justice's judgment is filed if the defendant is a resident of the county, until an execution shall have been issued by the justice directed to a constable, "and returned that defendant had no goods or chattels whereof to levy the same"; and a constable's return of "Not satisfied" to an execution against a resident defendant is insufficient to authorize the issuance of an execution and the sale of real estate.

Langford v. Few, 47 S.W. 927, 146 Mo. 142, 69 Am.St.Rep. 606.

Mo. 1900. The question whether an execution issued by a justice of the peace to authorize the issuance of a circuit court execution on a transcript of the justice's judgment was issued to the constable of a township other than that in which the defendant resided cannot be raised in a collateral suit.

Pullis v. Pullis Bros. Iron Co., 57 S.W. 1095, 157 Mo. 565.

Mo. 1901. No presumption arises from the issuance of an execution by the clerk of the circuit court on the transcript of a justice's judgment, as provided by Gen.St.1865, p. 717, § 14, and Id. p. 718, § 3, that a return that defendant had no goods whereof to levy such execution was made to the justice court judgment required by said section before execution on the transcript may issue.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Under Gen.St.1865, p. 717, § 14, and Id. p. 718, § 3, regulating the issuance of circuit court executions on transcripts of justices' judgments and making the previous execution issued by the justice of the peace returnable in 90 days, an earlier return is premature, and hence insufficient to sustain a sheriff's sale and deed.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Under Gen.St.1865, p. 717, § 14, and Id. p. 718, § 3, providing that no execution shall issue out of the circuit court on the transcript of a justice's judgment, if the defendant is a resident of the county, until an execution shall have been issued by the justice directed to a constable, and "returned that defendant has no goods whereof to levy the same," a return, "Not served for want of property," is insufficient to authorize the issuance of an execution by the clerk, and the sale of real estate, since it fails to show any effort to find property, which is contemplated by the statute.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Where an execution issued by a circuit court clerk on a transcript of the justice

court recites that the justice court execution was returned nulla bona, such recital is no evidence of the facts set forth, as the clerk was without authority to certify to such facts.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Mo. 1904. A return on an execution issued on a justice's judgment that "no property subject to execution has been found"—the defendant in the execution being a resident of the county—was sufficient to justify the filing of a transcript of the judgment in the circuit court, and the issuance of a subsequent execution by the clerk of such court, under Rev.St.1899, § 4019, providing that execution shall issue out of the circuit court under such circumstances only after a justice's execution has been returned that "defendant had no goods and chattels whereof to levy the same."

Littlefield v. Ramsey, 80 S.W. 949, 181 Mo. 613.

Mo. 1904. Rev.St.1899, § 4019, V.A.M.S. § 517.780 note, provides that no execution shall be issued from the circuit court on a transcript of a judgment rendered by a justice of the peace, if the defendant is a resident of the county, until the execution has been issued by the justice of the peace to the constable of the township in which the defendant resides, and has been returned nulla bona. *Held*, that where, at the time a justice's judgment was rendered, defendant was not a resident of the county, the issuance of an execution to a constable of the township in which the judgment was rendered, instead of the constable of the township in which plaintiff had formerly resided, did not impair the right of the circuit court to issue an execution based on a transcript and nulla bona return.

Mathewson v. Kilburn, 81 S.W. 1096, 183 Mo. 110.

Mo. 1905. A return to a justice's execution, reciting certain garnishment proceedings, and concluding, "By returning this writ no other property found upon which to levy this writ," was a sufficient return nulla bona within the statute to authorize the issuance of a circuit court execution upon a transcript of the justice's judgment.

Ables v. Webb, 85 S.W. 383, 186 Mo. 233, 105 Am.St.Rep. 610.

Mo.App. 1892. Under Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, providing that no execution shall be issued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable of the township in which the defendant resides, etc., the fact that defendant was, at the time the judgment was rendered, a resident of the county, does not require the issuance of execution in that county, if he has ceased to be a resident before the filing of the transcript.

Tracy v. Whitsett, 51 Mo.App. 149.

Mo.App. 1907. Rev.St.1899, § 4019, Ann. St.1906, p. 2191, V.A.M.S. § 517.780 note, declares that the circuit clerk may not issue execution on a transcript judgment until after the justice has issued an execution, and the constable has made return that "the defendant had no goods or chattels whereof to levy the same." *Held*, that a constable's return on a justice's execution, "No property found," constituted a substantial compliance with such provision, and authorized the issuance of an execution out of the circuit court on a transcript of such judgment.

Bick v. Paris, 101 S.W. 716, 124 Mo. App. 341.

⇐64-67.

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⇐68. Death of creditor before issue of writ.

Mo. 1881. 1 Rev.St.1879, § 2742, provides that, if one or more plaintiffs in a judgment or decree shall die before the same be satisfied, the judgment or decree, if concerning personalty, shall survive to the executors or administrators of such deceased party, and, if concerning real estate, to the heir or devisee. *Held*, that where plaintiff in an action for unlawful detainer died, judgment being unsatisfied, execution "concerning the personalty" was properly issued in the name of the administrator.

Sims' Adm'r v. Kelsay, 75 Mo. 68.

Mo.App. 1882. Under Rev.St. § 2742, providing that execution after the death of plaintiff shall run in the name of the legal representatives of the deceased plaintiff, and section 2764, providing that, in case of assignment, execution shall issue in the name of the original plaintiff, but shall be indorsed for the use of the assignee, an execution on an assigned judgment must, after the death of the assignor, issue in the name of the legal representatives of the assignor.

Welch v. City of St. Louis, 12 Mo.App. 516.

Mo.App. 1885. Rev.St. § 2742, provides that on the death of a judgment creditor execution may issue by his legal representatives, in the name of the decedent. Rev.St. § 736, provides that, on the return nulla bona of an execution against a corporation,

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execution may issue against the stockholders upon previous notice and hearing. *Held* that, where plaintiff, in an action against a corporation, died after final judgment rendered in his favor, his administrator could procure the issuance of an execution under section 736, without a previous revival of the action in the name of the administrator.

Simmons v. Heman, 17 Mo.App. 444.

⇐69. Death of debtor before issue of writ.

Mo. 1850. Where a special judgment was rendered in attachment proceedings without personal service, an execution cannot be issued on the judgment after the death of the debtor.

Harrison v. Renfro, 13 Mo. 446.

The act approved December 30, 1826, and which took effect May 1, 1827, by its direct provisions abolished executions against the estates of deceased persons. Under the prior statutes they were legal.

Mo. 1852. Carson v. Walker, 16 Mo. 68.

Mo. 1854. Miller v. Doan, 19 Mo. 650.

Mo. 1854. Doan v. Lisle, 19 Mo. 651.

Mo.App. 1907. An execution issued against the property of a judgment defendant after his death is void, and the court may quash the same, since it has control of its own process.

Bick v. Carter, 100 S.W. 531, 123 Mo. App. 311.

Mo.App. 1928. No execution could be issued on judgment after judgment debtor's death. Rev.St.1919, § 1568, V.A.M.S. § 511.-550.

King v. Hayes, 9 S.W.2d 538, 223 Mo. App. 138.

Mo.App. 1929. Judgment creditor after death of judgment debtor cannot have execution.

Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

⇐70. Notice and demand.

Mo. 1855. Under Act March 12, 1849, requiring notice of an execution to be given a judgment debtor who is a nonresident of the county in which the land to be sold is situated, where land was sold under execution, the fact that such notice was not given to the debtor, who was a nonresident of the county did not render the sale ipso facto void.

Hobein v. Murphy, 20 Mo. 447, 64 Am. Dec. 194.

Mo. 1867. A party who changes his residence and removes from the county after the commencement of a suit against him is not entitled, under Rev.Code 1855, p. 746, § 16, to notice of the issuing of execution to the sheriff of the county in which the judgment is recovered, before lands of the debtor there can be sold.

Buchanan v. Atchison, 39 Mo. 503.

Mo. 1867. Gen.St.1865, c. 160, §§ 43, 44, requiring notice to be given to a defendant where an execution is issued to a county other than that in which he resides, applies only to cases where the execution is to be levied on land situated in a county different from that in which the judgment was rendered and the execution issued.

Harper v. Hopper, 42 Mo. 124.

Mo. 1895. Under Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, providing that no execution shall issue from the circuit court on a transcript from a justice without notice to defendant if he is a resident of the county, notice of execution to the judgment debtor is not necessary where there is undisputed evidence in the record that he is a nonresident of the county.

McAnaw v. Matthis, 31 S.W. 344, 129 Mo. 142.

Mo. 1912. Rev.St.1909, § 2220, V.A.M.S. § 513.225, *held* not to require notice of execution in certain cases.

Daugherty v. Gangloff, 144 S.W. 434, 239 Mo. 649.

Mo. 1941. The clerk of circuit court has statutory duty to issue execution on judgment when requested to do so by holder of judgment. Rev.St.1939, §§ 1322, 13295, Mo.St.Ann. §§ 1158, 11676, pp. 1421, 1803, V.A.M.S. §§ 51.-120, 483.075, 513.045.

State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109, 348 Mo. 37.

The concluding language in judgment "And that the plaintiff, or defendant, have execution hereof", or equivalent language, does not authorize clerk to issue execution until issuance thereof is requested by successful litigant, and merely creates in litigant a power to cause clerk to issue execution.

State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109, 348 Mo. 37.

Mo. 1945. General executions may issue out of court in which judgment was rendered as a matter of course on request of plaintiff and without notice to defendant. Mo.R.S.A. § 1316, V.A.M.S. § 513.015.

State ex rel. Keitel v. Harris, 186 S.W.2d 31, 353 Mo. 1043.

For references to other topics, see Descriptive-Word Index

Mo.App. 1883. Renewal of demand on issuing alias execution. See,
Adams v. Tracy, 13 Mo.App. 579, memorandum.

⇐71. Leave of court.

⇐72. —— In general.

For cases from other jurisdictions, see other Key Number Digests.

⇐73. —— Lapse of time.

Mo. 1855. Section 2, art. 18, Prac.Act 1849, which provides that "after the lapse of five years from the entry of judgment an execution may be issued only by leave of the court on motion, with notice to the adverse party," applies to judgments existing at the time the act went into effect. The application is the same, even if execution has been sued out within the five years.
Bolton v. Landsdown, 21 Mo. 399.

Mo. 1866. Act March 3, 1863, Sess.Acts 1863, p. 20, did not authorize a party to sue out a new execution upon a judgment rendered more than five years before, without any revival of the judgment lien, and without leave of the court on motion and affidavit, as required by the statute. Rev.Code 1855, p. 904, §§ 13, 14.
Turner v. Keller, 38 Mo. 332.

Mo. 1885. Laws 1849, p. 92, art. 18, § 2, provided that, after the lapse of five years from the entry of a judgment, an execution may be issued only by leave of the court on motion, with notice to the adverse party. *Held* that, without such leave or judgment affirmatively appearing in the case, an execution issued after five years must be held a nullity, and the sale void, and consequently no title passed thereby.
Rollins v. McIntire, 87 Mo. 496.

⇐74. Order for issuance.

Mo. 1853. When the supreme court, on appeal, has affirmed, with damages, a judgment of a circuit court, the clerk of the circuit court may issue execution thereupon without an order of the circuit court being first obtained.
Wilburn's Adm'r v. Hall, 17 Mo. 471.

Mo. 1877. Rev.St.1855, §§ 48–53, in relation to courts, provides that specially adjourned sessions may be held in continuation of the regular term, on it being so ordered by the court or judge in term time, and entered by the clerk on the minutes of the court; and it is further provided that special terms of the circuit court may be held for the trial of any person confined in jail two months before the regular term. *Held*, that where an order for a writ of venditioni exponas was made at a "special term," as appeared by the record, it would be presumed that it was made at a special term for the transaction of general business, rather than at a special term for criminal business.
Hicks v. Ellis, 65 Mo. 176.

Mo. 1916. Under Rev.St.1909, § 2172, V.A.M.S. § 513.015, as to right to execution, it is not prerequisite to an execution that an express order for its issuance be made.
State ex rel. Capitain v. Graves, 190 S.W. 859.

Mo.App. 1891. While the clerical work of issuing an execution is always performed by the clerk, this does not oust the court of its jurisdiction to order the clerk to issue an execution, or to recall or quash an execution improvidently issued by the clerk; and hence it is proper for the court to order the issuance of an execution.
Johnson v. Jones, 47 Mo.App. 237.

Mo.App. 1948. After rendition of verdict and general judgment thereon in plaintiff's favor, the overruling of defendant's motion for a new trial, upon expiration of 30 days from date of judgment, no appeal having been taken, plaintiff was entitled forthwith to an execution in conformity with judgment without further order of court. Mo.R.S.A. §§ 847.-119, 1238, 1316 et seq., V.A.M.S. §§ 506.050, 510.370, 513.015 et seq.; Rules of Supreme Court, rules 3.24, 3.25.
State ex rel. Templeton v. Seehorn, 208 S.W.2d 789.

⇐75. Time for issuance.

Mo. 1852. An execution issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction, is not void, but merely voidable.
Carson v. Walker, 16 Mo. 68.

Mo. 1868. The provision of Rev.Code 1855, p. 951, c. 90, § 6, which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court, after three years had elapsed, without having it revived, refers exclusively to the issuing of executions by the justice of the peace, and has no application to a proceeding on a transcript.
Carpenter v. King, 42 Mo. 219, affirmed
Perkins v. Quigley, 62 Mo. 498, and
Corby v. Tracy, 62 Mo. 511.

Mo. 1872. Act 1865, which extends the time and releases the conditions prescribed in a former statute in regard to the issuing of executions, may apply to judgments recovered before the passage of the act, with-

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out being liable to the objection of affecting vested rights.

Henschall v. Schmidtz, 50 Mo. 454.

Mo. 1876. Though, under the statute, execution cannot issue on a judgment of a justice of the peace after three years from its rendition, a transcript may be taken to the circuit court after that time, and execution issued from that court on the transcript.

Corby v. Tracy, 62 Mo. 511.

Mo. 1876. Execution will not issue on a judgment after 10 years from its rendition, though the judgment has in the meantime been revived by scire facias.

George v. Middough, 62 Mo. 549.

Mo. 1885. Under Sess.Acts 1849, p. 92, art. 18, §§ 1, 2, it would seem that the absolute bar against issuing executions after 10 years, or at most 12 years, no longer exists; but in lieu thereof it is provided, after the lapse of 5 years from the entry of the judgment, that an execution may be issued only by leave of court, on motion, with notice to the adverse parties, etc., and therefore there was no absolute bar against issuing an execution in 1855, although the judgment was rendered in 1840, provided the motion, notice, and proof required by the act of 1849 was given and made.

Rollins v. McIntire, 87 Mo. 496.

As the law stood prior to 1849 and subsequent to the revision of 1855, which took effect the 1st of May, 1856, an execution could in no event issue on a judgment after the expiration of 12 years from the rendition of the judgment. Rev.St.1845, "Judgment and decrees"; Rev.St.1855.

Rollins v. McIntire, 87 Mo. 496.

Mo. 1887. The right to an execution follows, eo instante, on the rendition of the judgment, which is the judicial act on which the execution rests; its entry on the record being a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy.

Fontaine v. Hudson, 5 S.W. 692, 93 Mo. 62, 3 Am.St.Rep. 515.

The purchaser of land at a sheriff's sale in execution of a judgment, the lien of which had expired, acquires nothing thereby.

Mo. 1887. Christy v. McKee, 6 S.W. 656, 94 Mo. 241.

Mo. 1898. Benoist v. Rothschild, 46 S. W. 1081, 145 Mo. 399.

Mo. 1900. Where a judgment creditor asks for an execution within the period of the statute of limitations, the clerk of court is not justified in refusing it on the ground of delay.

State ex rel. City of Kansas City v. Renick, 57 S.W. 713, 157 Mo. 292.

Mo. 1902. Where an action is commenced by judgment creditors, within 10 years after the recovery of their judgment, to set aside an alleged fraudulent conveyance by their debtor, the time during which such suit is pending should not be considered in determining whether the suit is barred, under Rev.St.1899, § 3722, V.A.M.S. § 513.020, limiting the time for issuing executions to 10 years.

St. Francis Mill Co. v. Sugg, 69 S.W. 359, 169 Mo. 130.

Under Rev.St.1909, § 1912, V.A.M.S. § 516.350, execution may not issue upon ordinary judgment after 10 years from rendition.

Mo. 1917. Kansas City v. Field, 194 S. W. 39, 270 Mo. 500.

Mo. 1917. Kansas City v. Atchison, T. & S. F. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. Kansas City Southern Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. Missouri Pac. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. St. Louis & S. F. R. Co., 194 S.W. 43.

Under Rev.St.1909, § 9703, V.A.M.S. § 82.020 note, following V.A.M.S.Const. art. 9, § 16, and sections 9704, 2133, 1912, and Kansas City Charter, art. 10, § 20, *held*, that execution issued at instance of city July 12, 1913, on judgment assessing benefits originally rendered June 19, 1900, should have been quashed on motion of the landowner as issued too late.

Mo. 1917. Kansas City v. Field, 194 S. W. 39, 270 Mo. 500.

Mo. 1917. Kansas City v. Atchison, T. & S. F. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. Kansas City Southern Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. Missouri Pac. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. St. Louis & S. F. R. Co., 194 S.W. 43.

Under Rev.St.1909, § 1912, V.A.M.S. § 516.350, execution may not issue upon unrevived judgment if 10 years have elapsed from date of rendition by circuit court, regardless of whether such judgment was appealed from or not.

Mo. 1917. Kansas City v. Field, 194 S. W. 39, 270 Mo. 500.

Mo. 1917. Kansas City v. Atchison, T. & S. F. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. Kansas City Southern Ry. Co., 194 S.W. 43.

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Mo. 1917. Kansas City v. Missouri Pac. Ry. Co., 194 S.W. 43.

Mo. 1917. Kansas City v. St. Louis & S. F. R. Co., 194 S.W. 43.

Mo. 1920. If property belonged to a judgment debtor, though the lien of the judgment itself had expired, the judgment creditor was entitled to execution and levy on the property, under Rev.St.1909, § 2133, V.A.M.S. § 513.020, at any time within 10 years after date of the judgment.

Steele v. Reid, 223 S.W. 881, 284 Mo. 269.

Mo. 1928. Under statute providing that executions may issue upon judgment within 10 years thereafter, sale's validity is determined by date of execution. Rev.St.1919, § 1564, V.A.M.S. § 513.020.

Wayland v. Kansas City, 12 S.W.2d 438, 321 Mo. 654.

Mo. 1938. The statute providing that executions may issue on a judgment at any time within ten years after its rendition implies that an execution shall not issue after ten years unless other statutory provisions provide an exception. Mo.St.Ann. § 1113, p. 1404, V.A.M.S. § 513.020.

Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401, reversing 104 S.W.2d 1019.

The "payment" contemplated by statute providing that if a "payment" has been made on a judgment, order, or decree, the ten-year period within which execution may issue runs from the date of the last "payment" so made, means a "payment" made voluntarily or under and pursuant to a judgment or decree in a case such as a divorce case. Mo.St.Ann. § 886, p. 1168, V.A.M.S. § 516.350.

Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401, reversing 104 S.W.2d 1019.

Mo. 1941. Ordinarily, clerk receiving request from attorney to issue execution on judgment is required to do no more than issue execution in time for it to be served by the return day therein named.

State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109, 348 Mo. 37.

Mo.App. 1887. Though an execution bore a date within the 10 years after the rendition of the judgment, within which 10 years the statute permits plaintiff to sue out an execution, yet, where such execution was not received by the sheriff until almost a month after the expiration of such 10 years, it is too late, in the absence of some showing that the execution creditor has, within the time prescribed by law, done the affirmative act on his part evincive of a bona fide purpose to have the process made available. The mere writ, lying in the clerk's office in no officer's hands who could enforce it, ought not to be held the issuing of an execution within the spirit and intent of the statute.

Burton v. Deleplain, 25 Mo.App. 376.

Mo.App. 1892. Under Rev.St.1889, § 6287, V.A.M.S. § 517.780 note, limiting the time for issuing an execution on a transcript of a revived judgment to three years, such execution may issue more than three years from the date of reviving the judgment, if not more than three years after the filing of the transcript.

Tracy v. Whitsett, 51 Mo.App. 149.

⇐76. Præcipe or direction to issue.

Mo. 1898. Under Rev.St.1889, § 4895, V.A.M.S. § 513.015, providing that the party in whose favor any judgment is rendered may have an execution in conformity therewith, it cannot be assumed that the clerk has issued execution upon the judgment without direction from plaintiff or his attorney.

Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

Under Rev.St.1889, § 4895, V.A.M.S. § 513.015, providing that the party in whose favor a judgment is rendered may have execution thereon, such party is not bound by proceedings under an execution issued by the clerk without authority from the party or his attorney, though it is the clerk's custom to thus issue executions on judgments rendered at the preceding term.

Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

⇐77. Issuance and record thereof.

For cases from other jurisdictions, see other Key Number Digests.

⇐78. Form and requisites in general.

Mo. 1858. It is manifest error to embrace in one execution the claims of two parties, prosecuted in different suits, though against the same garnishee.

Bain v. Chrisman, 27 Mo. 293.

Mo. 1890. Rev.St.1879, § 3307, providing that the execution on a judgment of foreclosure "shall be a special fieri facias in accordance with the judgment," a sale is valid under a writ which sets out a copy of the judgment and a description of the mortgaged premises, and commands the sheriff to sell them and to have the proceeds before the court on the first day of the next term,

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to satisfy said judgment in the manner as therein described.

Lord v. Johnson, 15 S.W. 73, 102 Mo. 680.

Mo. 1937. Writ following form prescribed by statute for general fieri facias *held* a "general execution," returnable only at next or second succeeding term of court, notwithstanding execution was returnable forthwith since such fact alone would not make writ a "special execution" which is distinguished from a "general execution" in that a "special execution" specifies property to be sold and follows judgment with respect to distribution of proceeds. Mo.St.Ann. § 1153, p. 1418, V.A.M.S. § 513.025.

State ex rel. Madden v. Padberg, 101 S.W. 2d 1003, 340 Mo. 667.

⇐79. Name in which writ should run.

For cases from other jurisdictions, see other Key Number Digests.

⇐80. Direction to particular officer or county.

Mo. 1866. An execution directed to a coroner, reciting that there is a vacancy in the office of sheriff, may be turned over to the sheriff when the vacancy is filled before levy, and levy and sale under it by him will be valid.

Carr v. Youse, 39 Mo. 346, 90 Am.Dec. 470.

Mo.App. 1896. By the express provisions of Rev.St.1889, § 4899, V.A.M.S. § 513.035, executions on decrees of courts of record may be directed to and executed in any county in the state.

Maze v. Griffin, 65 Mo.App. 377.

⇐81. Description of and recitals as to parties.

Mo. 1864. Where an execution varied from the judgment in the names of the parties, plaintiffs and defendants, it was *held* fatally defective.

Crittenden v. Leitensdorfer, 35 Mo. 239.

Mo. 1873. Where D. filed a petition in behalf of himself and three other plaintiffs, and judgment was rendered thereon in favor of D. & Co., an execution on scire facias to revive such judgment, issued in the name of D., was not void by reason of its variance from the original judgment.

Ellis v. Jones, 51 Mo. 180.

Mo. 1873. Where an execution recited judgment, and ordered a levy against three defendants, but the judgment bound only two of them, the execution, under Wag.St. p. 839, § 15, should not be quashed, but should be amended, and directed against the defendants bound by the judgment.

Caldwell v. Fea, 54 Mo. 55.

Mo.App. 1878. Effect of discrepancies in description of defendant in execution. See,

Gorman v. Stanton, 5 Mo.App. 585, memorandum.

⇐82. Recital of judgment.

Mo. 1865. An execution which is only intended to be for costs is not invalid for failing to give the amount of the debt recovered in the judgment, when it refers to the judgment with such precision that no one could be mistaken about it, and otherwise it complies with the law.

Hunter v. Miller, 36 Mo. 143.

Mo. 1869. The execution under which a sale was made recited that it was in pursuance of a judgment rendered on the 13th day of September, 1860, when in fact it was rendered on the 12th day of September. *Held*, that this did not invalidate the sale and annul the proceedings, although Gen.St. 1865, c. 160, § 2, declares that an execution shall recite the day on which judgment was rendered.

Stewart v. Severance, 43 Mo. 322, 97 Am.Dec. 392.

Mo.App. 1907. An execution was headed "County of St. Louis—sct.," and recited that K., who was respondent's decedent, on February 23, 1905, "in our circuit court, recovered against defendant, White, the sum of two thousand ($2,000.00) dollars," etc. The execution was attested: "Witness, Thos. Winer, Clerk of said Court," with the seal of said court affixed June 30, 1906. *Held*, that the execution sufficiently identified the judgment on which it was based.

Overton v. White, 103 S.W. 512, 126 Mo. App. 363.

⇐83. Statement of amount.

Mo. 1824. In an action of debt on a recognizance of bail, judgment was had against the principal for $1,731.86 debt and for $53.07 damages, as well by reason of the detention of said debt as for his costs and charges, etc. Execution was issued for $1,731.86 debt and $41.12 for his damages by reason of the detention of said debt, together with his costs and charges by, etc., expended. *Held*, upon demurrer, that the variance was immaterial.

Easton v. Collier, 1 Mo. 467.

Mo. 1838. Where a judgment is for $83.03 debt and $1.76 damages, and the execu-

For references to other topics, see Descriptive-Word Index

tion for $83.01 debt and $1.76 damages, the variance is not material.

Montgomery v. Farley, 5 Mo. 233.

⇐84. Conformity to judgment.

Mo. 1885. A sale under execution, issued on an original judgment, is invalid where it does not conform to such judgment, but to a judgment nunc pro tunc, instead of the original judgment.

Coe v. Ritter, 86 Mo. 277.

Mo. 1906. Where a petition to recover taxes alleged a cause of action for the recovery of city taxes only, and the judgment was for taxes generally, an execution purporting to be issued on a judgment enforcing a lien for "state county and special taxes" was not responsive to the judgment, and was therefore void.

Rankin v. Porter Real Estate Co., 97 S.W. 877, 199 Mo. 345.

Mo. 1912. An execution to be valid must conform to the judgment on which it is based.

McManus v. Burrows, 152 S.W. 3, 246 Mo. 438.

Mo.App. 1884. Extent of variance which will invalidate. See,

Howard v. Still, 14 Mo.App. 584, memorandum.

Mo.App. 1894. An execution must conform to the judgment.

Maloney v. Real Estate, Building & Loan Ass'n, 57 Mo.App. 384.

⇐85. Command to levy and make amount.

For cases from other jurisdictions, see other Key Number Digests.

⇐86. Directions as to property to be taken.

⇐87. —— In general.

Mo. 1890. A special fi. fa. differs from the general writ, provided for under Rev.St. 1879, § 2336, only in that it points out and specifies the property to be sold, and pursues and follows the judgment in respect to the disposition of the proceeds arising from the sale.

Lord v. Johnson, 15 S.W. 73, 102 Mo. 680.

Mo. 1932. Where plaintiff obtained judgment sustaining attachment, special execution which required attached property to be first sold and then other property if attached property was insufficient, *held* not void but merely voidable. Rev.St.1929, § 1331, V.A.M.S. § 521.560.

Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

⇐88. —— Personal or real property.

Mo. 1914. In view of Rev.St.1909, §§ 2173, 2174, 7544, V.A.M.S. §§ 513.025, 513.070, a writ of execution, directing the sheriff to levy on the defendant's goods and chattels, issued out of the circuit court on a judgment rendered by a justice upon which execution had been returned nulla bona, and transcript filed in the circuit court, does not authorize a levy upon, and execution sale of, lands belonging to the defendant.

Keeline v. Sealy, 164 S.W. 556, 255 Mo. 692.

⇐89. —— Property attached.

Mo. 1855. Gen.St. § 58, providing that where judgment is rendered against a defendant the execution shall be a common fieri facias, where a general judgment was rendered in an attachment suit it was error to issue a special execution against the property attached.

Kritzer v. Smith, 21 Mo. 296.

Mo.App. 1914. Under Rev.St.1909, § 2331, V.A.M.S. § 521.390, an execution on a judgment based on constructive service, directing the officer to satisfy the same out of the attached property, and, if insufficient, then out of any other goods, chattels, lands, or tenements of defendant, was erroneous.

Stuckert v. Thompson, 164 S.W. 692, 181 Mo.App. 518.

⇐90. Directions for return.

Mo. 1847. An execution made returnable to a day out of term is not void, but only voidable, and the officer is bound to execute it.

Milburn v. State, to Use of Ray, 11 Mo. 188, 47 Am.Dec. 148.

Mo. 1848. An execution, issued by a justice of the peace, returnable in 60 days, instead of 90 days, as prescribed by law, is not merely erroneous, but is void, and will not justify the officer who levies it.

Stevens v. Chouteau, 11 Mo. 382, 49 Am. Dec. 92.

Mo. 1880. Under Sess.Acts 1860, p. 28, providing that executions issued upon a judgment of a court of record shall be returnable to the second term of the court after the date of the execution, error of the clerk in making a writ returnable to the first term of the court did not invalidate it, or make it returnable in law before the second term.

Estes v. Long, 71 Mo. 605.

Mo. 1912. An execution dated December 7, 1863, returnable on the fourth Monday

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in January next (A.D.1863) was returnable on the fourth Monday of January, 1864, notwithstanding the clerical error.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

⇐91-94.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐95. Indorsements.

Mo.App. 1897. Plaintiff, who was the owner of an unsatisfied judgment against defendants, entered into a parol agreement with a third person by which plaintiff sold such judgment to such third person; it being understood that such third person was to have a right to enforce the judgment by execution to issue in the name of plaintiff. *Held*, that Rev.St.1889, § 6045, V.A.M.S. § 511.710, requires the clerk, when issuing an execution on such judgment, to indorse thereon that it is for the use of such third person as assignee.

Chemical Bank v. Bulkley, 68 Mo.App. 327.

⇐96. Delivery to and receipt by sheriff.

For cases from other jurisdictions, see other Key Number Digests.

⇐97. Amendment.

Mo. 1853. Where a writ of execution was directed to the coroner instead of the sheriff, and a motion was made to quash the writ and return because it did not show why the writ was so issued, it was proper to allow the plaintiff to amend the writ by stating that the sheriff was one of the defendants.

Moss v. Thompson, 17 Mo. 405.

Mo. 1874. A general execution levied only on attached property is merely irregular, and may be corrected at any time by an amendment nunc pro tunc.

Bray v. McClury, 55 Mo. 128.

Mo. 1922. Where an execution is amendable it will be accorded in another court the same effect as if it had been amended.

Sligo Furnace Co. v. Coombs, 239 S.W. 816.

Mo.App. 1950. Where judgment for $660.02 was valid only in amount of $408.12, defendant was not entitled to have execution wholly quashed and to be entirely relieved of levy on his property because of the variance, but the variance was so substantial that it should be corrected.

Kennedy v. Boden, 231 S.W.2d 862.

⇐98. Renewal and reissue.

For cases from other jurisdictions, see other Key Number Digests.

⇐99. Alias and pluries writs.

Mo. 1871. The failure of a clerk of court to comply with a statutory provision which requires him, in issuing a new execution, to refer to the former one, and, in case levies have been made, to recite such levies, and authorize the sheriff to levy such new execution upon additional property, etc., invalidates the process.

Maupin v. Emmons, 47 Mo. 304.

Mo. 1877. Where an execution was issued to the sheriff of another county, the issuance of an alias execution in the county where the judgment was rendered did not operate as an abandonment of the levy of the execution in the other county.

Hicks v. Ellis, 65 Mo. 176.

Mo. 1883. The taking of property levied on under execution out of the constable's possession by a writ of replevin sued out by the grantee of the debtor does not authorize the issuance of an alias writ, inasmuch as the property, being in custodia legis, could not be replevied either by the debtor or his grantee.

State ex rel. Colvin v. Six, 80 Mo. 61.

Mo. 1884. Where a first execution was void, the fact that a second execution was not entitled an "alias execution" was not ground for quashing it.

Bushong v. Taylor, 82 Mo. 671.

Mo. 1912. Laws 1862–63, p. 20, a war measure to preserve the force of former levies not executed, did not require an alias execution to recite former levies under a prior execution which was fully executed on all the property levied on.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

⇐100. Variance.

Mo. 1877. A judgment on a scire facias recited that it was adjudged that the judgment stand revived and plaintiff have execution for a specified sum for damages, and that plaintiff recover his costs, to be paid out of the goods and chattels of the deceased defendant remaining in the hands of his executor; but the execution issued on the judgment contained a command that the officer make the judgment of the goods and chattels, if sufficient could be found, and, if not, then out of the lands and tenements of the debtor. *Held*, that, inasmuch as the execution was in conformity with the second section of Rev. St.1885 in relation to executions, there was

no variance between the judgment and execution.

Houck v. Cross, 67 Mo. 151.

⇐101. Alteration.

For cases from other jurisdictions, see other Key Number Digests.

⇐102. Defects, objections, and waiver.

Mo.App. 1950. Execution was not void because it did not conform to requirements of statute providing that in case of assignment, execution shall issue in name of original plaintiff, but shall be endorsed by a clerk or justice to be for the use of the assignee, where names of original plaintiffs appeared in the execution, since requirement of statute that execution issue in names of original plaintiffs is intended merely to identify the execution and connected it with the judgment under which it issues. Mo.R.S.A. §§ 1301, 1302, V.A.M.S. §§ 511.700, 511.710.

Kennedy v. Boden, 231 S.W.2d 862.

⇐103. Collateral attack.

Mo. 1871. Where an execution is regular on its face, its validity cannot be questioned in a collateral proceeding so as to injure the rights of the purchaser.

Cabell v. Grubbs, 48 Mo. 353.

Mo.App. 1878. Validity of irregular execution against collateral attack. See,

Gorman v. Stanton, 5 Mo.App. 585, memorandum.

⇐104-106.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

⇐107. Creation and existence of lien.

⇐108. —— In general.

Mo. 1875. Under Rev.St.1855, pp. 745, 746, § 21, providing that no execution should be a lien on property to which the lien of a judgment, order, or decree does not extend or has expired, from the time such writ shall be delivered to the officers of the proper county, a judgment rendered in one county becomes a lien on land in another only from the date of its receipt by the sheriff of the latter county.

Lillard v. Shannon, 60 Mo. 522.

⇐109. —— As dependent on levy.

Mo. 1887. Under Rev.St.1879, § 2389, the levy of a writ of fieri facias under a judgment constitutes a lien on the land, and has the effect of continuing the lien of the judgment until the execution of the writ.

Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

⇐110. Commencement of lien.

Mo. 1856. The levy of a writ of attachment on land creates a lien from the commencement of the levy, and a sale under an execution levied on a judgment against defendant in attachment relates back to the time of the levy, and passes all title to the purchaser, unaffected by any incumbrance or conveyance made subsequent to the levy.

Lackey v. Selbert, 23 Mo. 85.

Mo. 1860. From the delivery of an execution issued by a justice of the peace to the constable, it is a lien on the personal property of defendant "found within the limits within which the constable or other officer can execute the process."

Gott v. Williams, 29 Mo. 461.

⇐111. Property or interests affected, and extent of lien.

Mo. 1843. An execution issued by a justice of the peace is a lien on all the goods and chattels of defendant in the execution within the limits of the township to which the execution is directed, from the time of its delivery to the constable.

Brown v. Burrus, 8 Mo. 26.

Mo. 1860. If the judgment is rendered in one township, and defendant resides in another, and the execution issued is directed to the constable of the township in which the judgment is rendered, the lien of the execution will be coextensive with the county.

Gott v. Williams, 29 Mo. 461.

Mo. 1862. The lien of an execution attaches to property acquired by the debtor after the execution comes into the hands of the officer. Rev.Code 1855, p. 964.

State, to Use of Beazley, v. Blundin, 32 Mo. 387.

Mo. 1889. As the homestead of a judgment debtor is not subject to levy and sale under the judgment, no lien attaches to the land thereunder.

Grimes v. Portman, 12 S.W. 792, 99 Mo. 229.

Mo.App. 1879. The statute providing that "the execution from the time of delivery to the constable shall be a lien on the goods" is not intended to apply to goods exempt from execution.

Kulage v. Schueler, 7 Mo.App. 250.

Mo.App. 1894. The increase of animals after levy and while such animals are in the custody of the constable or his bailee are

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held under the levy, the same as the animals levied on.

Talbot v. Magee, 59 Mo.App. 347.

Mo.App. 1900. Where an execution is levied on real property, but is not levied on money in the hands of the judgment debtor, the existence of which the debtor did not disclose, no lien is acquired on such money.

Murphy v. Wilson, 84 Mo.App. 178.

⇐112. Priorities between executions.

D.C.Mo. 1875. The writ first executed will take personal property, without regard to their dates or the time of delivery to the officers, and the lien given by such delivery binds the goods against a voluntary transfer.

In re Tills, Fed.Cas.No.14,052, 11 N.B.R. 214.

Mo. 1824. Where an execution in favor of A. against B. is returned, stating that the money was not made by order of plaintiff's attorney, and an alias execution is issued and put in the hands of the sheriff subsequently to an execution in favor of C. against B., and the property levied on is not sufficient to satisfy both executions, the claim of C. is to be first satisfied. A.'s first execution does not operate as a lien on the property after the writ has been returned.

Brown v. Cape Girardeau County Sheriff, 1 Mo. 154.

Mo. 1845. Where there has been an execution and levy, and the proceedings stayed by plaintiff, his lien is destroyed as to executions subsequently coming to the hands of the sheriff, and the latter will be first satisfied.

Wise v. Darby, 9 Mo. 131.

Mo. 1845. As between two executions against the same defendant, the liens attach at the time of the levy, and not at the time of the delivery to the officer.

Field v. Milburn, 9 Mo. 492.

Mo. 1852. Where a judgment creditor directs the sheriff to suspend the levy of an execution until further orders, and keeps the execution suspended until crowded by other executions or attachments, his execution will be *held* constructively fraudulent against subsequent executions or attachments.

Field v. Liverman, 17 Mo. 218.

Mo. 1864. The order of plaintiff that properly levied on by a sheriff under an execution in his favor should remain in defendant's hands is constructively fraudulent, and void as against subsequent executions, which will be entitled to prior satisfaction.

Parker v. Waugh, 34 Mo. 340.

Mo. 1866. Where judgments have equal effect as liens, the judgment creditor who first levies his execution on property subject to levy acquires a priority, and is entitled to be first paid out of the proceeds of the sale under the execution.

Bruce v. Vogel, 38 Mo. 100.

Mo. 1873. Money paid into court through stress of garnishment proceedings under a second execution cannot be turned over to plaintiff on a prior execution against the same defendant, whereunder was no garnishment.

Pritchard v. Toole, 53 Mo. 356.

Mo. 1883. Where two liens, one for costs and one for attorney's fees, are created at the same time and by the same decree, and are equal, the issue and levy of an execution for the costs gives priority, and a purchaser at the sale thereunder acquires the superior title, as against a subsequent purchaser under execution issued in proceedings to enforce the lien for attorney's fees.

Shirley v. Brown, 80 Mo. 244.

Mo. 1890. Under Rev.St.1879, § 2353, providing that personal property shall in all cases be subject to execution for the purchase money, and shall in no case be exempt, except in the hands of an innocent purchaser for value and without notice, a levy under an attachment for purchase money has no priority over prior levies; section 2353 being a statute of exemption only, and not one creating a lien, or regulating priorities between creditors.

Straus v. Sole Leather Pad Co., 14 S.W. 940, 102 Mo. 261.

Mo.App. 1939. Where judgments are not of equal rank, executions, when issued, will take priority according to priority of their effective judgment liens.

City of St. Louis v. Wall, 124 S.W.2d 616, 235 Mo.App. 9.

⇐113. Priorities between executions and other liens or claims.

Mo. 1845. Service of an attachment creates a valid lien which prevails over a subsequent execution.

Field v. Milburn, 9 Mo. 492.

If, after an execution has been delivered to a constable, but before a levy, property of defendant is attached by the sheriff, the execution will be postponed to the attachment.

Field v. Milburn, 9 Mo. 492.

Mo. 1865. A person conveyed real estate to several grantees by a deed conditioned for the payment of debts owed by

him to some of them, and for indemnity against liabilities incurred as co-sureties and otherwise severally by others of them, and giving a power to B., one of the grantees, to sell the property in case of default made in such payment or indemnification. The grantor afterwards delivered possession of the land to B. to be sold under the deed, which, however, was not done, and the grantor was allowed to remain in occupancy. *Held*, that B. was entitled to a crop which was growing on the land at the time he took possession, and which he afterwards harvested, as against an execution creditor of the grantor, although it was left under the immediate charge of the grantor.

Steele v. Farber, 37 Mo. 71.

Mo. 1872. The title of a bona fide mortgagee under an unrecorded mortgage is good, as against titles acquired at execution sale, if the mortgage was duly recorded before such sale.

Sappington v. Oeschli, 49 Mo. 244.

Mo. 1877. If an execution be issued on a judgment and levied while the judgment is a lien on real estate, the effect of it is to continue the lien and its priority until the writ is executed, and a sale thereunder gave the purchaser a title superior to one acquired by purchase at a sale under a deed of trust which was given after the rendition of the judgment, but before either the issuance or levy of the execution.

Durrett v. Hulse, 67 Mo. 201.

Mo. 1879. Under Wag.St. p. 841, § 5, executions issued upon judgments are from the time of delivery to the constable a lien on the debtor's stock of goods as against an assignee for the benefit of creditors under an assignment made subsequently to the issuance of the execution.

Frost v. Wilson, 70 Mo. 664.

Mo. 1894. A purchaser of stock at execution sale, under an attachment against the original pledgor, acquires it subject to the pledge.

McClintock v. Central Bank, 24 S.W. 1052, 120 Mo. 127.

Mo.App. 1889. Under Rev.St.1879, § 2353, providing that personal property shall in all cases be subject to an execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser for value without notice of the existence of such prior claim for the purchase money, an execution issued upon a judgment for the purchase price, when levied upon property sold, is entitled to precedence over senior attachments levied on the same property.

Boyd v. J. M. Ward Furniture, Stove & Carpet Co., 38 Mo.App. 210.

Notwithstanding Rev.St. §§ 2500, 2505, 2507, which make a secret reservation of any right in goods in the possession of another void as to purchasers of the vendee, as well as subsequent purchasers, a vendor's execution, issued upon a judgment for the purchase price of personal property, when levied upon the property, is entitled to precedence over senior attachments levied on the same property. Rev.St.1879, § 2353.

Boyd v. J. M. Ward Furniture, Stove & Carpet Co., 38 Mo.App. 210.

Mo.App. 1910. Where plaintiffs were in actual possession of personal property levied on through their agents, under an execution prior to defendant's at the time the property was seized under defendant's execution, plaintiffs were entitled to hold possession as against any right acquired by defendant.

Missouri State Bank v. South St. Louis Foundry, 129 S.W. 433, 145 Mo.App. 257.

⇐114. Proceedings for determination of priority.

Mo. 1850. Where a deed of trust bore date on the 11th day of the month, and was left for record on the 13th of the same month, and the sheriff on the latter day, before the deed was offered for record, seized the property embraced in the deed, on a writ of that date, at the suit of another creditor, it was *held* that these facts threw on the trustee the burden of showing that his title accrued under the deed before the seizure by the sheriff.

Pearce v. Dansforth, 13 Mo. 360.

⇐115. Transfers of property pending or subject to execution.

Mo. 1838. A levy and sale under execution will prevail against a prior unrecorded deed.

Waldo v. Russell, 5 Mo. 387.

Mo. 1847. Where defendant in execution was in possession of the land at the time the execution was levied the title of a purchaser at the execution sale cannot be disputed by a subsequent vendee of the execution defendant.

Page v. Hill, 11 Mo. 149.

Where the execution defendant was not in possession of the land at the time of the levy of the execution, but had conveyed the same by deed not recorded, his vendee may dispute the title of the purchaser at the ex-

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ecution sale by setting up an outstanding title.

Page v. Hill, 11 Mo. 149.

Mo. 1851. Where a judgment is recovered against the vendor after he has made a deed of land, and before it is recorded, if the deed be recorded before a sale under the judgment the grantee will hold the land against the purchaser at the execution sale.

Davis v. Owenby, 14 Mo. 170, 55 Am.Dec. 105.

Mo. 1857. A judgment was given against two defendants, and fieri facias issued, so that it did not appear which of them it was against, or whether it was against both, and was returned nulla bona as to one of defendants (it did not appear which), and, on a transcript of the record of these proceedings, execution issued from a higher court against the land of one of defendants. *Held*, that the purchaser under the sheriff's deed took no title against a prior purchaser from such defendant.

Linderman v. Edson, 25 Mo. 105.

Mo. 1862. After an execution came to the officer's hands, the debtor traded his horse to A. for a mule, and then traded the mule to a third party for a horse. Subsequently A., on hearing of the execution, swapped horses with defendant. *Held*, that the lien of the execution attached to the horse which the debtor had received from the third party, notwithstanding its subsequent transfer to A. Rev.Code 1855, p. 964.

State, to Use of Beazley v. Blundin, 32 Mo. 387.

Mo. 1876. Where by virtue of a statute an execution in the hands of an officer is a lien on the property from the date of its issue, the fact that a partner, after issue of an execution against firm property, but before its levy, conveyed all his interest therein to his copartner, will not exempt the property conveyed from the execution.

Pierce v. Kingsbury, 63 Mo. 259.

Mo. 1896. It appeared that the levy of an execution on land in M. county on a judgment in K. county was properly made, and on the same day notice of such levy was filed with the recorder of deeds, etc. *Held*, that such levy created a lien on the land, and was notice to subsequent purchasers, and a sale under the levy gave the purchaser at such sale a superior title to that of a purchaser from the judgment debtor after the levy.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

Mo. 1909. An execution sale relates back to the date of the judgment lien and cuts out an intervening deed by the judgment debtor.

White v. Spencer, 117 S.W. 20, 217 Mo. 242, 129 Am.St.Rep. 547, 16 Ann.Cas. 598.

⇐116. Duration of lien.

Mo. 1849. Where an execution was levied on real estate on which the judgment was already a lien, and the term of court at which the writ was returnable was postponed by an act of the legislature, so that the lien of the judgment expired before the writ was executed, the lien of the judgment was preserved until the writ was executed, and a sale under the execution vested a good title in the purchaser.

Bank of Missouri v. Wells, 12 Mo. 361, 51 Am.Dec. 163.

Under Act March 23, 1863, Sess.Acts 1863, p. 20, § 2, providing that, where real estate levied on under an execution is not sold at the next term of the court, the lien of the levy under the execution shall remain in force until a term of court is held in the county where the property may be sold, when an execution is levied, prior to the return day thereof, on property, it will continue in force, for the purpose of a new and independent levy on other property, after the return day of the execution.

Mo. 1869. McDonald v. Gronefeld, 45 Mo. 28.

Mo. 1869. McDonald v. Freese, 45 Mo. 32.

Under that act the execution would afterwards be dead for all purposes, except the preservation of rights which attached prior to the return day by virtue of the antecedent levy.

Mo. 1869. McDonald v. Gronefeld, 45 Mo. 28.

Mo. 1869. McDonald v. Freese, 45 Mo. 32.

Mo. 1870. Under Act March 23, 1863, Sess.Acts 1863, p. 20, when the sale of land on which an execution has been levied, at the next term of the court after issue, is rendered impossible without fault of the officer making the levy, the execution and the lien created by it are continued from term to term until the land can be sold. No venditioni exponas is necessary, and when the land is so sold the purchaser's title is good, and the act extends the time on an execution issued before the act went into effect.

Wood v. Messerly, 46 Mo. 255.

Mo. 1870. Where the vendor of real estate obtains a judgment to enforce his lien for the purchase money, and sues out execution, but dies prior to sale thereunder, a

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special execution may be issued in the name of his administrators, under Gen.St.1865, p. 904, § 17, Wag.St. p. 791, § 14, without a revival of the judgment.

Gaston v. White, 46 Mo. 486.

Mo. 1872. A special execution in attachment suits may continue after the return term with like force as general executions in attachments or in any other suits.

Groner v. Smith, 49 Mo. 318.

Mo. 1877. Any execution, issued from a court of record in one county to the sheriff in another county, under which real property might be sold, whether the levy was made under such execution or some other writ, which it supplemented or exceeded, fell within the provisions of section 3 of the act of March 23, 1863, providing that executions now issued or that may hereafter be issued from a court of record in one county and sent to the sheriff in any other shall be levied on real estate, and, if from any cause the circuit court of said last-mentioned county shall not be held before the return day of such execution, the sheriff shall return such execution, and the levy made by virtue thereof shall remain in full force until there shall be a term of the circuit court in such last-mentioned county at which the real estate may be sold.

Hicks v. Ellis, 65 Mo. 176.

Mo. 1887. Under Rev.St.1879, § 2389, the levy of a writ of fieri facias under a judgment constitutes a lien on the land, and has the effect of continuing the lien of the judgment until the execution of the writ.

Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

Judgment having been rendered, a fi. fa. issued returnable to the next term, but was returned "Not satisfied." Thereupon a vend. ex. was issued reciting the execution, levy, etc., and the sale was made at the next term of the court. The lien of the judgment would have expired between the time of the order for the vend. ex. and its issue. Rev. St.1879, § 2389, provides that, "when a sale shall not be made under execution and levy at the next term of the court, the execution and lien thereby created shall continue in force until the end of the second term, and until a term of the court is held at which there may be a sale according to law." *Held*, that the title of the purchaser at the sheriff's sale was superior to that of one claiming under a deed from the trustee of a deed of trust made by defendant after the judgment.

Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

Mo. 1914. Where an execution was levied on certain land prior to the beginning of the September, 1900, terms of the N. county circuit court, the lien was kept alive until sale by Rev.St.1909, § 2228, V.A.M.S. § 513.-265, though the word "unsatisfied" had appeared in the execution docket opposite the judgment, such word not indicating a return of the execution.

Barnes v. Imhoff, 162 S.W. 152, 254 Mo. 217.

⇐117-119.

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⇐120. Effect of payment or satisfaction of judgment after issue of writ.

Mo. 1900. The fact that an execution purchaser took an assignment of the judgment between the time of levy and the date of sale did not operate as a payment of the judgment so as to affect the validity of the sale.

Bradley v. Heffernan, 57 S.W. 763, 156 Mo. 653.

⇐121. Control of writ and directions to officer.

For cases from other jurisdictions, see other Key Number Digests.

⇐122. Necessity for levy.

Mo.App. 1914. The mere issuance of an execution upon a judgment does not give the officer to whom it is directed the right of possession of any property until he has levied the writ thereon.

Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.

⇐123. Authority to levy.

Mo. 1860. Under Sess.Acts 1850, p. 203, establishing the Weston court of common pleas, and providing that it shall have concurrent original jurisdiction with the circuit court in all civil actions where defendant resides and the process is served within the corporate limits, and making it the duty of the marshal of the city to attend court and execute all processes, the marshal had authority to levy on and sell real estate within the city.

Blanchard v. Baker, 29 Mo. 441.

Mo.App. 1886. An illegal and futile attempt to levy on property under execution does not deprive the officer of his right to make another and valid levy at any time prior to the return day of the execution.

Hombs v. Corbin, 20 Mo.App. 497.

Mo.App. 1888. It will be presumed that an officer had the writ of execution under

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which he made his levy with him at the time of the levy and up until the return day.

Bilby v. Hartman, 29 Mo.App. 125.

⇐124. Powers of officer in making levy.

For cases from other jurisdictions, see other Key Number Digests.

⇐125. Time for levy.

A sheriff has no authority to make a levy by virtue of an execution after the return day thereof; Sess.Acts 1863, p. 20, § 2, and Rev.Code 1855, p. 748, § 54, having reference only to levies under valid subsisting executions.

Mo. 1866. Bank of Missouri v. Bray, 37 Mo. 194.

Mo. 1879. Jefferson City v. Curry, 71 Mo. 85.

Mo. 1875. Act Feb. 15, 1863, relating to executions in certain counties named therein, keeps an execution issued in any one of those counties alive after the return day.

Lillard v. Shannon, 60 Mo. 522.

Mo. 1884. A sheriff has until the return day of an execution to levy the same, unless special circumstances require an immediate levy.

State ex rel. Farwell v. Leland, 82 Mo. 260.

A sheriff must use reasonable diligence in levying an execution, and levy it in a time which is reasonable under all the circumstances.

State ex rel. Farwell v. Leland, 82 Mo. 260.

Mo. 1887. A sale under executions issued on special judgments rendered on special tax bills as provided by section 4 of the Kansas City charter, although the executions came to the hands of the sheriff on the 1st day of April, and were returnable to the next April term, which began on the second Monday in April, and nothing was done under them till the 28th day of April, when the property was advertised for sale, *held* not void, when the property to be sold for the payment of the judgments has been seized, set apart, and designated by the judgment of the court.

Karnes v. Alexander, 4 S.W. 518, 92 Mo. 660.

Under Rev.St.1909, § 2175, V.A.M.S. § 513.030, providing that every execution shall be made returnable at the next succeeding term, unless the plaintiff shall otherwise direct, and in view of section 2228, § 513.265, providing that, where an execution is issued and levied by the proper officer upon real estate, the execution lien created thereby shall remain in force until the end of the second term of the court of the county, where the land is situated, and until a term of court is held, an execution returnable to the September term does not become functus officio at the beginning of that term, and the land may be sold under it thereafter.

Mo. 1911. Butler v. Imhoff, 142 S.W. 287, 238 Mo. 584.

Mo. 1911. Barnes v. Imhoff, 142 S.W. 291, 238 Mo. 598.

⇐126. Mode and sufficiency of levy.

⇐127. —— In general.

Mo. 1847. On an execution against two, the officer cannot at the same time take the property of one and the body of the other.

Usher v. Thomas, 10 Mo. 761.

Mo. 1875. A constructive possession will not amount to a levy, under Wag.St. p. 606, § 19, defining "levy" as the actual seizure of property by the officer charged with the execution of the writ.

Douglas v. Orr, 58 Mo. 573.

Mo.App. 1886. Under Rev.St. § 2357, a valid levy under execution cannot be made without an actual seizure of the property by the officer.

Hombs v. Corbin, 20 Mo.App. 497.

Mo.App. 1894. An execution plaintiff has an unconditional and absolute right to have the process executed by levy and sale of any property belonging to defendant which may be subject to execution.

Maloney v. Real Estate, Building & Loan Ass'n, 57 Mo.App. 384.

Mo.App. 1914. Under Rev.St.1909, § 2195, V.A.M.S. § 513.010, to constitute a levy the officer must take such manual possession of the property as its nature renders practicable at the same time asserting dominion over it under his levy.

Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.

The property must be where the levying officer can exercise control over it, and he must profess to levy upon it and assert dominion over it.

Hobbs v. Williams, 162 S.W. 334, 175 Mo. App. 409.

Mo.App. 1924. To constitute levy under execution, seizure, if possible from nature of property, or, if not, act as nearly equivalent as possible, is necessary. Per Arnold, J.

First Nat. Bank v. Polk, 263 S.W. 504.

⇐128. —— Demand and selection of property.

For cases from other jurisdictions, see other Key Number Digests.

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⇐129. —— Personal property in general.

Mo. 1857. In levying execution against a single partner on his interest in the partnership property, the sheriff may seize and take possession of the entire partnership property, or any portion thereof, and deliver possession thereof to the execution purchaser.

Wiles v. Maddox, 26 Mo. 77.

Mo. 1866. A sheriff's sale of personal property on execution passes no title, where he never took possession of it or delivered it to the purchaser, and did not have it at the place of sale; Rev.Code 1855, tit. "Execution," § 74, providing that the word "levy" shall be construed to mean the actual seizure of the property.

Newman v. Hook, 37 Mo. 207, 90 Am. Dec. 378.

Mo.App. 1888. A levy on a growing crop is sufficient if the officer goes upon the land and in view of the property and in the presence of the only person found upon the land makes the memorandum of levy and informs such person of the same.

Bilby v. Hartman, 29 Mo.App. 125.

It is not requisite to a valid levy on a growing crop that the officer take the witnesses to the place of the levy.

Bilby v. Hartman, 29 Mo.App. 125.

Mo.App. 1900. Where the sheriff, having an execution, merely looked at the personal property and made a list of it, but took no possession nor placed any one in charge, and did not attach any notices or other insignia of his levy to any part of the chattels, and did not fasten or secure the building in which any portion of them were contained, no sufficient levy was made.

Hopke v. Lindsay, 83 Mo.App. 85.

Mo.App. 1914. A marshal's mere announcement that he was on the judgment debtor's premises "for the purpose of levying" on a stock of goods was not a declaration of an actual levy.

Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.

⇐130. —— Particular interests in personal property.

For cases from other jurisdictions, see other Key Number Digests.

⇐131. —— Corporate stock.

Mo.App. 1902. Ind.T.Ann.St. § 2118 (Mansf. Dig. § 3003), provides that where, on a judgment rendered in the Indian Territory, execution is issued against any corporate stock, etc., the secretary of the corporation shall, on request, furnish the officer having the execution a statement of the shares of stock held by the judgment debtor; and section 2119 (section 3004) provides that the officer may thereupon levy the execution on such shares by leaving a copy of the writ with such secretary, etc. *Held*, that in the absence of any statute making foreign corporations doing business within the territory domestic for the purposes of suit and levy of process, the statutes applied solely to domestic corporations, and did not authorize a levy upon stock in a foreign corporation doing business in the territory by leaving a copy of the writ with the secretary of the corporation, who happened to be in the territory at the time.

Caffery v. Choctaw Coal & Mining Co., 68 S.W. 1049, 95 Mo.App. 174.

⇐132-133.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐134. —— Real property and interests therein.

Mo. 1860. In levying execution on real estate, it is not necessary that the sheriff should go on the land to make the levy, if he is sufficiently informed to describe it properly.

Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575.

⇐135. Levy on property taken under other process.

Mo. 1866. An officer's reception of a second writ of execution, while the first is in his hands, operates as a constructive levy on all the property in his possession by virtue of the first writ.

State, to Use of McMurray, v. Doan, 39 Mo. 44.

Mo. 1903. Where a levy of a writ of execution is made by the same officer who levied a prior attachment, no overt act is required of him in making the subsequent levy.

Smith v. Rogers, 73 S.W. 243, 99 Mo.App. 252, affirmed 90 S.W. 1150, 191 Mo. 334.

Mo.App. 1893. Where a constable had levied on property and taken possession of the same, the act of another constable having an execution against the owner of the property in seizing possession of the goods and selling them was wrongful, and amounted to a trespass; his only right having been to make a second levy.

Allen v. Davis, 53 Mo.App. 15.

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⇐136. Successive levies under same writ.

Mo. 1847. The fact that an execution on a judgment against a principal and surety had been levied on property of the principal which could not be sold for want of bidders does not prevent it from being subsequently levied on the property of the surety.

Moss v. Craft, 10 Mo. 720.

Mo. 1869. Where the execution was issued on May 28th, and was made returnable at the June term, and land was levied on, but by order of plaintiff no sale was made at the June or September term, but at the December term the property was sold under the original execution without any new levy, the execution reciting the former levy, the sale was valid, as under Sess.Acts 1863, p. 20, the execution continued in force.

Stewart v. Severance, 43 Mo. 322, 97 Am.Dec. 392.

Mo. 1875. The levy of an execution on personal property does not invalidate its subsequent levy on land.

Lillard v. Shannon, 60 Mo. 522.

⇐137. Notice of levy.

The notice of execution required to be given to a judgment debtor residing out of the county by Act March 12, 1849, need not be given where mortgaged land is to be sold under a special fi. fa.

Mo. 1855. Hobein v. Murphy, 20 Mo. 447, 64 Am.Dec. 194.

Mo. 1855. Hobein v. Drewell, 20 Mo. 450.

Mo. 1860. To constitute a valid levy of an execution on real estate, it is not necessary that notice of the levy should be given by the sheriff to defendant in the execution.

Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575.

Mo. 1866. Rev.Code 1855, p. 746, § 46, provides that, when land situated in a different county from that in which the execution defendant owning such real estate resides is sought to be sold under execution, it shall be the duty of plaintiff to cause a written notice to be served on defendant owning the real estate, if residing in the state, stating the fact of the issuing of the same, etc. *Held*, that the notice required by said section need be given only where an execution is to be levied on land situated in a county other than that in which the execution issued.

Harris v. Chouteau, 37 Mo. 165.

Mo. 1868. Where suit was brought in one county against a defendant, a resident of another county, who appeared and defended, and judgment was rendered against him, and execution was issued, and land in the county where suit was brought was levied on and sold without any notice to defendant, it was *held* that the sale was legal.

Harper v. Hopper, 42 Mo. 124.

Mo. 1888. Rev.St. § 2381, which requires notice to defendant, when his real estate, situated in a county other than that of his residence, is to be sold under an execution, does not apply where the judgment was rendered, and the execution issued, in the county where the land is situated.

Lohman v. Stocke, 8 S.W. 9, 94 Mo. 672.

Mo. 1894. Rev.St.1889, § 4943, V.A.M.S. § 513.225, which requires that notice be given to defendant when his real property, situated in a different county from that in which he resides, is sought to be sold under execution, does not apply in favor of one ignorant of the pendency of an action against him, when the judgment is rendered and execution issued in the county in which the land is situated.

Harness v. Cravens, 28 S.W. 971, 126 Mo. 233.

Mo. 1896. Under Rev.St.1889, § 4943, V.A.M.S. § 513.225, requiring notice in writing to a defendant in an execution of "all execution sales," where a judgment is rendered in a county where defendant resides on personal service of notice, and an execution is issued to and levied on defendant's land in another county, he is entitled to notice of the levy.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

Mo. 1902. Rev.St.1899, § 3178, V.A.M.S. § 513.085, providing that no execution prior to levy thereof shall be a lien on personalty or any real estate to which the lien of the judgment does not extend, and that, when execution is levied on such real estate, notice of the levy shall be filed in the county in which it is situated, does not refer to real estate in the county, covered by a homestead which is abandoned after rendition of the judgment.

Smith v. Thompson, 69 S.W. 1040, 169 Mo. 553.

Mo. 1945. General executions may issue out of court in which judgment was rendered as a matter of course on request of plaintiff and without notice to defendant. Mo.R.S.A. § 1316, V.A.M.S. § 513.015.

State ex rel. Keitel v. Harris, 186 S.W. 2d 31, 353 Mo. 1043.

For references to other topics, see Descriptive-Word Index

⇐138. Indorsement or entry of levy.

⇐139. —— In general.

Mo. 1860. Where the law is silent as to what shall constitute the evidence of a levy, it will be sufficiently regular if the memorandum of the levy be made on a separate piece of paper and copied on the writ of execution before its return. The officer may use his advertisement as evidence of the levy in making his return to the writ.

Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575.

Mo. 1872. The dating of a levy made under an execution before the date of the issue of the execution will not vitiate it.

Porter v. Mariner, 50 Mo. 364.

Mo.App. 1888. It is not necessary that an officer indorse the levy on the writ of execution at the time it is made, but it is sufficient if he makes the indorsement before the return of the writ.

Bilby v. Hartman, 29 Mo.App. 125.

⇐140. —— Description of property.

Mo. 1844. The whole of a quarter section of land was levied on and sold as the property of defendant in execution, it being described in the levy as "the northwest fractional quarter of section 35, township 49, range 17," and sold under the same description. *Held*, that the description was sufficient, although a single lot of 13,500 square feet was owned by another person than defendant.

Rector v. Hartt, 8 Mo. 448, 41 Am.Dec. 650.

Mo.App. 1886. Where an officer has levied on property under execution, his right to retain custody thereof does not terminate on the return day of the execution; but he is entitled thereafter to retain the property in order to prosecute such further proceedings as may be necessary for the satisfaction of the judgment.

Hombs v. Corbin, 20 Mo.App. 497.

Mo.App. 1894. Even though property levied upon be left with a third person as bailee or for safe-keeping, such possession or custody is deemed that of the officer.

Talbot v. Magee, 59 Mo.App. 347.

Mo.App. 1903. A description of a city lot in an execution levy otherwise sufficient was not fatally defective because it described the lot as having a frontage of 27 feet, when in fact its frontage was 26 feet; the greater description including the less.

Barber Asphalt Pav. Co. v. Kiene, 74 S. W. 872, 99 Mo.App. 528.

⇐141. Inventory and appraisement.

Mo. 1893. Appraisers living in a well-settled county, from a mile to a mile and a quarter from property levied on, are prima facie "from the neighborhood," within the statutory requirement.

State ex rel. McClenden v. Jungling, 22 S.W. 688, 116 Mo. 162.

⇐142. Amount of property taken, and excessive levy.

Mo. 1869. The fact that upward of 11,000 acres of valuable land in one of the best counties in the state is levied on to satisfy an execution of less than $150 is suggestive of the most flagrant abuse of legal process.

Hannibal & St. J. R. Co. v. Brown, 43 Mo. 294.

Mo. 1873. Where a sheriff levied on a steamboat worth about $40,000 by virtue of an execution for $109, the levy was excessive, as he might have satisfied his execution by levying on a small part of the furniture.

Silver v. McNeil, 52 Mo. 518.

Mo. 1883. Where 333 shares of stock, of the par value of $100 a share and the actual value of $75 a share, were levied on under a judgment for $7,539.71, the levy was excessive.

American Wine Co. v. Scholer, 13 Mo. App. 345, affirmed 85 Mo. 496.

Mo.App. 1944. A judgment creditor is entitled to execution for the amount shown to be due on the judgment, but should not be permitted to tie up the judgment debtor's property by execution and garnishment for an amount in excess thereof.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo.App. 873.

⇐143. Irregularities and objections as to levy, and waiver.

Mo. 1871. Rev.St.1825, p. 144, provides that judgments on constructive notice in attachment cases, where defendant makes default, shall be entered as in other cases, but shall bind only the property attached, and that no execution shall issue thereon against any other property. *Held* that, where judgment was rendered by default in an attachment case against defendant, the fact that the execution against the attached property was an ordinary fi. fa. did not invalidate the levy, since the execution was not void, and furnished sufficient authority to the sheriff to levy on the attached property.

Cabell v. Grubbs, 48 Mo. 353.

Mo. 1896. Under Rev.St.1889, § 4943, V.A.M.S. § 513.225, providing that, where real estate owned by defendant is situated

For later cases see same Topic and Key Number in Pocket Parts

in a different county from that of his residence, plaintiff, in order to levy on it, must serve notice in writing of such levy on the execution defendant, the failure to serve notice of such levy on defendant is an irregularity which can be taken advantage of only by defendant.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

Mo.App. 1914. A judgment debtor was not precluded from claiming that there was no levy made upon his goods, where, after he refused to consent to a levy, the officer desisted and finally left without claiming that he had levied on the goods.

Hobbs v. Williams, 162 S.W. 334, 175 Mo.App. 409.

Mo.App. 1918. The claim that, because the sheriff, after levying on property, left it in defendant's building, in charge of and to be used by the government through its postmaster, there was no sufficient seizure of the property to make its subsequent sale on execution valid, to be viewed with favor should come from some creditor or purchaser claiming an intervening right or lien.

Mayes v. Cunningham, 204 S.W. 404.

⇐144. Quashing or setting aside levy.

Mo. 1886. A circuit court of one county has no jurisdiction to hear and determine a motion to quash the levy of an execution on land within such county, when such execution was issued by the circuit court of another county, in which the judgment on which it was issued was rendered.

Mellier v. Bartlett, 1 S.W. 220, 89 Mo. 134.

Mo. 1894. The fact that an execution was levied on exempt property will not warrant the vacation of the execution and levy where the execution is in conformity with the judgment and the return does not show the exempt character of the property.

Catron v. Lafayette County, 28 S.W. 331, 125 Mo. 67.

Trial court's order quashing levy of execution, based on hypothetical facts set up in motion but unsupported by evidence, or admission, or waiver of proof, *held* not sustainable.

Mo. 1924. John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 305 Mo. 182.

Mo. 1924. First Nat. Bank v. Brown, 264 S.W. 677.

Mo. 1924. Nichols Wire & Sheet Co. v. Brown, 264 S.W. 677.

Mo. 1924. Oliver Chilled Plow Works v. Brown, 264 S.W. 677.

Title to real estate cannot be tried and determined on a motion to quash a levy under execution, and hence levy was erroneously quashed on ground that title was in defendant and his wife by the entirety.

Mo. 1924. John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 305 Mo. 182.

Mo. 1924. First Nat. Bank v. Brown, 264 S.W. 677.

Mo. 1924. Nichols Wire & Sheet Co. v. Brown, 264 S.W. 677.

Mo. 1924. Oliver Chilled Plow Works v. Brown, 264 S.W. 677.

Mo.App. 1892. A motion to quash the levy of an execution on an alleged homestead cannot be granted, in the absence of any evidence of the levy.

Blandon v. Martin, 50 Mo.App. 114.

Mo.App. 1928. Court, in proceeding to quash levy because of exemption, can determine disposition of money paid into court, by garnishee.

Southern Coal Co. v. Shepard, 9 S.W.2d 257, 223 Mo.App. 112.

⇐145. Operation and effect of levy in general.

Mo. 1881. Levy of execution on property subject to a judgment lien continues the lien until execution of the writ by sale.

Riggs v. Goodrich, 74 Mo. 108.

Mo.App. 1887. The issuance of an execution on a judgment for nominal damages, after the affirmance of such judgment by the Court of Appeals, does not estop plaintiff, in whose favor the judgment was rendered, from recovering a judgment in substantial damages, after the reversal of the judgment of the Court of Appeals by the Supreme Court, where it was not shown that plaintiff authorized the issuance of the execution or that he derived any benefit therefrom.

State, to Use of Kearney, v. Finn, 24 Mo. App. 344.

Mo.App. 1892. Where defendant, having recovered in an action of unlawful detainer, levied execution on certain corn, which defendant in that action had raised on the land in controversy, he could not thereafter, in a suit against him on an indemnifying bond, claim the corn as a part of the land.

State ex rel. Wright v. Casteel, 51 Mo. App. 143.

⇐146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.

⇐146 (1). In general.

Mo. 1821. Where an execution was issued and returned unsatisfied by order of

For references to other topics, see Descriptive-Word Index

plaintiff's attorney, and an alias execution was issued after another execution against the debtor had been received by the sheriff, the later execution is the superior, as the original execution had not operated as a lien after it had been returned.

Brown v. Cape Girardeau County Sheriff, 1 Mo. 154.

Mo.App. 1888. The act of a constable who had levied on a growing crop in first advertising for sale the portion of the crop which had been cut and piled up was not an abandonment of his levy on the corn left standing in the field.

Bilby v. Hartman, 29 Mo.App. 125.

Mo.App. 1888. A release of a levy by judgment creditors, is as to a third person secondarily liable for the debt on which the judgment was secured, a satisfaction of the judgment and a payment of the debt.

Hess v. Powell, 29 Mo.App. 411.

Where a levy was made at the instance and for the benefit of one secondarily liable on the debt which was the foundation of the judgment, the release of the levy by the sheriff did not operate to discharge such person from liability for the debt.

Hess v. Powell, 29 Mo.App. 411.

⇐146 (2). Failure to maintain possession.

Mo.App. 1888. A valid levy on a growing crop of corn is not rendered invalid because the officer does not harvest the corn or place a guard over it when it becomes ripe before the day of sale.

Bilby v. Hartman, 29 Mo.App. 125.

⇐147. Restoration of levy or lien.

For cases from other jurisdictions, see other Key Number Digests.

⇐148. Rights of officer as to property taken.

See post, ⇐149.

⇐149. Custody and care of property.

Mo.App. 1902. To constitute a valid levy of an execution, so as to permit a writ of venditioni exponas after the execution has spent its force, the officer must maintain his possession and control of the property to such an extent that it could not probably be taken from his custody without his knowing it.

Caffery v. Choctaw Coal & Mining Co., 68 S.W. 1049, 95 Mo.App. 174.

⇐150. Delivery of property to bailee or receiptor.

For cases from other jurisdictions, see other Key Number Digests.

⇐151. Delivery of property on forthcoming or delivery bond.

⇐152. —— In general.

Mo. 1880. The sureties on a delivery bond were estopped to make the defense that the sheriff made no levy on the goods by an actual seizure.

Hundley v. Filbert, 73 Mo. 34.

Mo.App. 1900. Under Rev.St.1889, § 4932, V.A.M.S. § 513.155, providing that on the giving of a forthcoming bond the levy shall remain a lien on the property, into whosoever possession it may come, where a sheriff takes property on execution, and the defendant gives a forthcoming bond, and subsequently brings replevin, asserting that such sheriff had wrongfully taken the property from his possession, a claim that, when the replevin was commenced, the execution was functus officio, is without merit, though the property was not sold during the life of the execution.

Livingston v. Allen, 83 Mo.App. 294.

⇐153. —— Requisites and sufficiency of bonds.

Mo. 1842. A forthcoming bond, if the form is not prescribed by statute, is not void because it does not follow the words of the statute.

Grant v. Brotherton's Adm'r, 7 Mo. 458.

The penal sum, as expressed in a bond, was "two thousand," and the condition was for the forthcoming of property to the value of $1,000. *Held*, that the word "dollars" might be inserted after "two thousand."

Grant v. Brotherton's Adm'r, 7 Mo. 458.

Mo. 1853. A bond, extorted by a sheriff to compel the delivery of property levied on which is exempt from execution, is void, unless defendant waives his rights, either by act or omission.

Robards v. Samuel, 17 Mo. 555.

Mo. 1855. Though a forthcoming bond be not good as a statutory bond, it may be good at common law.

Waterman v. Frank, 21 Mo. 108.

Mo. 1855. Rev.Code 1845, concerning executions, provides that, when the sheriff or other officer charged with the service of an execution shall levy it on personal property, the defendant may retain possession thereof until the day of sale by giving bond in favor of the plaintiff, conditioned for the delivery of the property at the time and place named in the condition. It also provides for enforcement of the bond by a summary proceeding in case of default. Goods were levied on by a sheriff under an execution, and advertised to be sold. On the day of sale, by

agreement of the parties, a bond was executed by the defendant in the execution for the delivery of the goods at a future day. *Held* not such a bond as was contemplated by the statute, and hence not enforceable by a summary proceeding on motion.

Selmes v. Smith, 21 Mo. 526.

⇐154. —— Liabilities on bonds.

Mo. 1849. Where a defendant in an execution executes a bond for the delivery of the property on the day of sale, and part of the property is delivered, though not a performance of the condition of the bond, whatever amount is made by the sale of it should be credited on the judgment.

Lee v. Moore, 12 Mo. 458.

Mo.App. 1893. Where by the terms of a recognizance it is expressly provided that, if the application of the principal to stay plaintiff's execution should be finally determined against him, he would pay plaintiff the debt and costs to be recovered by such execution, or render in execution all his property liable to be seized and sold by such execution, or that his sureties would do it for him, performance is not excused by the fact that the sheriff afterwards sells the defendant's property under another execution, as the act of the sheriff in so selling was occasioned by the omission of defendant to satisfy the same, and therefore the act of the sheriff was that of defendant, in so far as plaintiff was concerned.

Seaman v. Paddock, 55 Mo.App. 296.

Mo.App. 1901. There can be no breach of a redelivery bond, the condition in which is that the principals "shall have property such as shall be adjudged to be the property of ——— when and where the court shall direct," until there has been an adjudication as to the title of ———.

D. M. Sechler Carriage Co. v. Hymes, 87 Mo.App. 193.

⇐155. —— Actions on bonds.

Mo. 1849. Where a judgment debtor gives a forthcoming bond to the sheriff, and the whole property is not delivered on the day of the sale, the condition of the bond is broken, and the judgment creditor can have judgment on the bond against the principal and sureties for the value of the property and 10 per cent. interest if the property is less than the debt, and if equal or greater than the debt then for the amount of the debt with interest at the same rate.

Lee v. Moore, 12 Mo. 458.

Mo. 1866. A sheriff cannot maintain an action against the obligor in a delivery bond for damage done or suffered to the property after the execution of the bond.

Jones v. Jones, 38 Mo. 429.

Mo.App. 1920. Under Rev.St.1909, §§ 2212, 2213, V.A.M.S. §§ 513.170, 513.175, where defendant in execution gives forthcoming bond, and fails to comply with its conditions, if the value of the property is less than the debt, judgment against him and his sureties should be for the value and 10 per cent. interest and costs; if the value of the property is greater than the debt, judgment should be against the sureties for the debt and 10 per cent. interest and costs.

Chicago, R. I. & P. R. Co. v. Morrow, 221 S.W. 768.

Where value of property whereon execution was levied was greater than judgment debt, and assignee of judgment took judgment against execution defendant and sureties on forthcoming bond for value of property and 10 per cent. interest with costs, under Rev.St.1909, §§ 2212, 2213, V.A.M.S. §§ 513.170, 513.175 the original judgment was merged in the second judgment taken on the bond against the execution defendant and sureties, and court properly made costs in original proceeding part of judgment in second proceeding on bond.

Chicago, R. I. & P. R. Co. v. Morrow, 221 S.W. 768.

Judgment for costs cannot be collaterally attacked in suit wherein the execution defendant, having reimbursed his sureties on forthcoming bond for the amount they paid, alleges execution for costs was unlawfully issued, and was void, that the items were illegal and extortionate, not taxable or collectible as costs in the judgment, etc.

Chicago, R. I. & P. R. Co. v. Morrow, 221 S.W. 768.

⇐156. Expenses of keeping property, and compensation of custodian.

C.C.A.Mo. 1909. Where the enforcement of a levy upon property is stayed until the final hearing of a suit in equity, while the security of the levy is preserved, and at the final hearing it is found that the judgment debtor must pay some part of the amount unpaid on the judgment, such debtor is liable for the costs of guarding and holding the property levied upon during the stay.

Loy v. Alston, 172 F. 90, 96 C.C.A. 578.

Mo. 1870. If cattle seized by a sheriff under execution remained in the pasture of a stranger to the proceedings by his permission, he would be entitled to a reasonable compensation therefor, even though they

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were originally placed there against his consent.

Stephenson v. Porter, 45 Mo. 358.

⇐157. Delivery of property to creditor in satisfaction.

For cases from other jurisdictions, see other Key Number Digests.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

⇐158. Stay of execution.

⇐158 (1). In general.

C.C.Mo. 1890. The federal circuit court has power to grant a temporary stay of execution of its judgments.

Eaton v. Cleveland, St. L. & K. C. Ry. Co., 41 F. 421.

Under Rev.St.Mo.1879, § 3215, Mo.St. Ann. § 3216, p. 5030, V.A.M.S. § 429.540, an execution sale under a judgment foreclosing a mechanics' or contractors' lien against a railroad is only for the benefit of such lienholders as have obtained judgment at the time of the sale. Judgment was obtained by 2 lienholders, while in 20 or more suits to enforce other liens against the same property judgment had not been reached. *Held*, that to prevent a sacrifice of the judgment debtors' interest, and to avoid the expense of numerous sales, and complications of title resulting from same, the court would temporarily stay execution on the first judgment until other claims were reduced to judgment.

Eaton v. Cleveland, St. L. & K. C. Ry. Co., 41 F. 421.

Mo. 1849. Where an administrator agreed with the plaintiff to allow a judgment to be rendered against him in the circuit court for a certain amount, with the understanding that he should be credited with such amount, or with as much as the county court should thereafter allow him on settlement, it was proper for the circuit court to stay execution on plaintiff's judgment until the settlement was made in the county court.

Wilkson v. State, to Use of Stong, 12 Mo. 353.

Mo. 1896. A stay of execution is subject to the order of the court in which the cause is pending, in accordance with the demands of justice and the obvious spirit of the statutes authorizing a stay.

American Brewing Co. v. Talbot, 36 S. W. 657, 135 Mo. 170.

Mo.App. 1885. Enforcement of agreement to stay execution. See,

State ex rel. Laughlin v. Duncan, 16 Mo.App. 548, memorandum.

Mo.App. 1885. The fact that, since the rendition of the verdict upon which a judgment against defendant is based, defendant has been summoned as a garnishee to answer in respect to a debt due by the plaintiff, furnishes no ground for staying execution on the judgment.

Rankin v. Lawton, 17 Mo.App. 574.

Mo.App. 1885. The right to stay execution being in derogation of the common law, the party claiming it must bring himself within the terms of the statute giving the right.

State, to Use of Knapp, Stout & Co., v. Finn, 19 Mo.App. 557.

Mo.App. 1907. Under Rev.St.1899, § 777, V.A.M.S. § 511.170, providing that a final judgment entered against any defendant who shall not have been summoned or who shall not have appeared in the suit or who has been made a party as the representative of one who shall have been summoned or appeared shall be set aside on a petition showing good cause for setting it aside, an execution may not be stayed on the ground that the judgment was not authorized by the verdict.

Warren v. Chicago, B. & Q. Ry. Co., 99 S.W. 16, 122 Mo.App. 254.

Mo.App. 1929. Stay of execution on ground of garnishment proceedings against judgment debtor is discretionary and should be denied in case of collusion.

In re Morrison's Estate, 17 S.W.2d 560.

Assistance rendered garnishing creditor by judgment debtor does not constitute collusion, preventing stay of execution, unless given to defraud.

In re Morrison's Estate, 17 S.W.2d 560.

On motion to stay execution because of garnishment proceeding by third party, exclusion of evidence that proceedings were prosecuted and financed by judgment debtor *held* error.

In re Morrison's Estate, 17 S.W.2d 560.

Mo.App. 1951. Motion to stay execution is one attacking enforcement of judgment, and order which court makes upon it is one from which appeal will lie. V.A.M.S. § 512.-020.

City of Caruthersville v. Cantrell, 241 S.W.2d 790.

⇐158 (2). Bond or other security.

Mo. 1860. An act of the state of Indiana, providing for the stay of execution and the giving of a bond as security for its payment, further provided as follows: "And such bond, from the date of its execution, shall be

taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same, and against their estates, and execution may issue thereon accordingly." A judgment was obtained in Indiana, and a bond was duly executed and filed and recovered under the provisions of the above act. *Held*, that such bond could not be sued on in the courts of this state, and was not entitled to full faith and credit as a judgment of a court of the state of Indiana.

Foote v. Newell, 29 Mo. 400.

Mo. 1913. Where plaintiff failed to appeal from provision of decree authorizing defendants to file bond for $10,000 in lieu of the issuance of execution, *held*, that she could not attack it as limiting defendants' liability on a motion by defendants for the approval of the bond.

Pickel v. Pickel, 158 S.W. 8, 251 Mo. 197.

Mo.App. 1889. One who assumes payment of a note of his vendor as part consideration for land is not entitled to a decree staying the issue of execution upon a judgment on such note until the holder thereof execute and file with the clerk of the court a bond to indemnify defendant against loss or damage that shall occur to him by reason of the breach of covenants of warranty in the deed, as such decree would make it possible for plaintiff to lose his debt, which was secured by mortgage on the land, which he could have enforced, had it not been for defendant's action in making a sale of the land to a third person who had no knowledge of the mortgage.

Price v. Reed, 38 Mo.App. 501.

Mo.App. 1902. The assignee of a judgment can sue in his own name for a breach of a bond to stay execution, though it was assigned to him by a common-law, instead of a statutory, assignment.

Campbell v. Harrington, 93 Mo.App. 315.

Mo.App. 1916. Rev.St.1909, § 2245, V.A.M.S. § 513.365, requiring bond for stay of execution on motion to quash, applies only to a motion filed before a judge in vacation, and not to such a motion in open court.

R. W. Wallace & Sons Mfg. Co. v. Hagood Mfg. Co., 189 S.W. 32, 196 Mo. App. 40.

⇐159. Quashing or vacating writ.

⇐160. —— In general.

Mo. 1879. A motion to quash the execution because the judgment is void for want of service of the writ of summons is not an attempt to contradict a record collaterally, as the return upon the writ is a part of the same record which recites that defendant was duly summoned.

Brown v. Langlois, 70 Mo. 226.

Mo. 1924. A stranger to a judgment has no standing to move to quash an execution thereon, except in special circumstances, and is not given such right by Rev.St.1919, §§ 1675–1677, V.A.M.S. §§ 513.360–513.375.

Nelson v. Nelson, 258 S.W. 1007, 302 Mo. 440.

Mo. 1932. Irregularity in execution issued on judgment sustaining attachment, in requiring attached property to be sold first and then other property, should be taken advantage of by motion to correct or quash execution. Rev.St.1929, § 1331, V.A.M.S. § 521.360.

Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

Mo. 1942. Persons who were strangers to the judgment pursuant to which execution was issued could not try issues involving title to real estate, the validity of sales for taxes, innocent purchasers for value and like questions on their motion to quash the execution.

St. John Levee and Drainage Dist. v. Barnett, 163 S.W.2d 915, 349 Mo. 1037, transferred 157 S.W.2d 129.

A stranger to a judgment cannot generally move to quash an execution.

St. John Levee and Drainage Dist. v. Barnett, 163 S.W.2d 915, 349 Mo. 1037, transferred 157 S.W.2d 129.

Mo.App. 1940. Holders of notes secured by deed of trust, who were strangers to suit to recover taxes on the land but were privies of former holder of the notes, which was a party to such suit, were not "strangers" to the judgment rendered in such suit, and hence they could maintain motion to quash execution obtained by assignee of the tax judgment.

State ex rel. Gilkison v. Andrews, 133 S.W.2d 695.

Mo.App. 1940. Where judgment recovered in proceedings against movant's father was in rem and affected land, of which movant was record owner, movant could properly file motion to quash execution, irrespective of whether movant acquired the land by purchase or inheritance from movant's father. Mo.St.Ann. § 1223, p. 1456, V.A.M.S. § 513.360.

State ex rel. Ross, and to Use of Drainage Dist. No. 8 v. Robertson, 137 S.W. 2d 492, 234 Mo.App. 813.

For references to other topics, see Descriptive-Word Index

Mo.App. 1949. A motion to quash an execution cannot be substituted for an appeal.

Baumgartner v. Cloud, 218 S.W.2d 793.

⇐161. —— Grounds.

On a motion to quash an execution, errors and irregularities in the rendition of the judgment cannot be inquired into.

Mo. 1873. Brackett v. Brackett, 53 Mo. 265.

Mo.App. 1878. Merrick v. Merrick, 5 Mo.App. 123.

Mo.App. 1881. Gregory v. Gregory, 10 Mo.App. 589.

Mo.App. 1895. Johnson v. Greve, 60 Mo. App. 170.

Mo. 1847. Where an execution issues from the circuit court on a transcript of a judgment by a justice of the peace it will not be quashed for informalities before the justice, where the defendant had appeared and submitted to the judgment.

Grissom v. Allen, 10 Mo. 303.

Mo. 1869. Gen.St. p. 648, which gives a party the privilege of taking steps in vacation to have further proceedings on an execution stayed until it can be determined in court whether the execution should be quashed, is not an exclusive remedy, and does not prevent the usual resort to a motion to quash the execution at the return term in open court.

Parker v. Hannibal & St. J. Ry. Co., 44 Mo. 415.

Mo. 1874. Where plaintiff's petition alleged the indebtedness of A., B., and C., and by a clerical mistake judgment was entered against all three, but summons was served and judgment rendered and execution issued against A. only, it was error to quash the execution on the ground that the suit was thereby dismissed as to B. and C.

Henry v. Gibson, 55 Mo. 570.

Mo. 1875. Where the statement filed with a justice of the peace alleged that the work performed for which a mechanic's lien was claimed consisted of tearing down a building, an execution issued from the circuit court on a transcript sent up from the justice court may be quashed on a motion, since the justice court obtained no jurisdiction and the proceeding therein was a nullity.

Holzhour v. Meer, 59 Mo. 434.

Mo. 1884. Rev.St.1879, § 2998, provides for filing transcripts of justices' judgments in the office of the clerk of the circuit court. Section 2999 provides that no execution shall issue out of the clerk's office until an execution shall have been issued by the justice, if defendant resides in the county, and returned nulla bona. A transcript of a judgment of a justice was filed in the office of the clerk of the circuit court and the clerk issued execution. It appeared that the execution issued by the justice was returned before its regular legal return day. *Held*, that the execution issued by the clerk was improvidently issued and should be quashed.

Johnson v. Latta, 84 Mo. 139.

Mo. 1919. Judgment on bond on appeal from conviction of infraction of ordinance of city of the fourth class, having defects appearing on its face, was subject to attack by motion to quash execution.

City of Versailles v. Ross, 208 S.W. 454.

Mo. 1942. In action to declare a resulting trust in favor of plaintiffs to real estate where judgment for plaintiffs erroneously adjudicated rights to certain personalty in plaintiffs, a writ of restitution thereunder not covering personal property was not subject to motion to quash.

Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916.

Mo.App. 1884. The fact that appraisers appointed under the homestead law have acted erroneously is no ground to quash a levy.

Straat v. Rinkle, 16 Mo.App. 115.

Mo.App. 1884. Error of a justice in scire facias in entering a new judgment, including accrued interest, instead of reviving the formal judgment and issuing a new execution for the amount of the original, together with the accrued interest and costs, as provided by Rev.St. §§ 3005, 3006, is waived, where defendant does not appeal, and cannot be rectified by proceedings in the circuit court to quash or recall the execution issued on the transcript.

Bauer v. Miller, 16 Mo.App. 252.

Mere error or irregularity preceding the rendition of a judgment will not warrant a motion to quash the final process issued thereon, but want of jurisdiction will.

Mo.App. 1885. Ewing v. Donnelly, 20 Mo.App. 6.

Mo.App. 1906. Harbert v. Durden, 92 S.W. 746, 116 Mo.App. 512.

Mo.App. 1926. Butler Bros. v. Cantwell, 287 S.W. 794.

Mo.App. 1886. An execution is not to be quashed on account of a misconception by the clerk in including in the amount thereof an improper item.

City of Warrensburg v. Simpson, 22 Mo. App. 695.

Mo.App. 1892. The fact that a petition does not state a cause of action does not de-

prive the court of jurisdiction, so as to render a judgment for plaintiff void and execution issued thereunder subject to being quashed on motion.

Horstmeyer v. Connors, 51 Mo.App. 394.

The court has no power to quash an execution on the ground that the petition in the action in which the judgment was rendered did not state a cause of action or for errors occurring at the trial.

Horstmeyer v. Connors, 51 Mo.App. 394.

Mo.App. 1895. Where a judgment which had been obtained against the maker, surety, payee, and indorsers on a note had been paid by the maker, who caused it to be assigned to a third party, in whose favor an execution was issued against the indorsers, the execution should be quashed; the judgment having become extinct.

Johnson v. Greve, 60 Mo.App. 170.

Mo.App. 1895. Where one of two joint debtors has paid their judgment creditor the full amount of the judgment, an execution against the other is properly quashed.

Badger Lumber Co. v. McColgin, 63 Mo. App. 470.

Plaintiffs recovered personal judgment against defendant and wife, with special judgment enforcing a mechanic's lien against the wife's property, which was sold under the judgment and purchased by plaintiffs. The property was afterwards sold under a prior mortgage, bringing more than the amount of the mortgage. This was claimed by plaintiffs and also the wife, who settled the dispute by a compromise in which the wife paid plaintiffs more than the amount of their judgment and they entered satisfaction of the judgment as to the wife on the margin of the record. Afterwards general execution was issued against defendant. *Held*, that the execution was properly quashed.

Badger Lumber Co. v. McColgin, 63 Mo. App. 470.

Mo.App. 1897. An execution issued on a judgment which has been fully paid should be quashed.

Wyatt v. Fromme, 70 Mo.App. 613.

Mo.App. 1898. Where, a few days after an execution was issued, plaintiff received and retained a draft from defendant for the judgment due plaintiff, but did not cash such draft, stating as a reason the pendency of a motion to quash the execution, the costs being improperly charged and the principal judgment being thus paid, and the writ for the whole sum, principal and costs, being allowed to remain in the hands of the officer, the writ should have been quashed.

Sinclair v. Missouri, K. & T. Ry. Co., 74 Mo.App. 500.

Mo.App. 1901. Where it has been made to appear that a levy has been made on property not subject to sale, the levy will be quashed, but not so where the execution is against the husband and the levy is on the wife's realty, in which case the creditor has a right to subject to sale any substantial interest in the property which the husband may have.

Ryan v. Bradbury, 89 Mo.App. 665.

Mo.App. 1902. Where an appellee on appeal from a justice moves to dismiss, and the motion is sustained, but thereafter a judgment of affirmance is entered, it is no ground for quashing an execution issued.

Hathaway v. St. Louis, K. & S. R. Co., 68 S.W. 109, 94 Mo.App. 343.

Mo.App. 1902. During the pendency of an action plaintiff died, and at the next term his death was noted on the record, and an entry made: "Administrator ——— enters appearance, and cause revived." The case was twice continued after this, once at defendant's cost; and, when subsequently called for trial, judgment was rendered for plaintiff nil dicit. On motion of plaintiff, notice having been given to defendant, the record was corrected nunc pro tunc by having the order of revival made in formal language, showing the name of the administrator as plaintiff. *Held*, that a motion by defendant to quash the execution issued on the judgment was properly overruled.

Mudd v. Walser, 68 S.W. 1056, 95 Mo. App. 285.

Mo.App. 1907. The fact that the Court of Appeals made an alleged misstatement of fact from the record in its opinion affirming a judgment was no ground for quashing an execution issued thereon.

Overton v. White, 103 S.W. 512, 126 Mo. App. 363.

Mo.App. 1914. An execution issued on a void judgment should be quashed.

State ex rel. Behrens v. Wilson, 161 S. W. 1179, 176 Mo.App. 268.

Mo.App. 1915. A judgment cannot be impeached on a motion to quash an execution issued thereon.

Hammett v. Hatton, 176 S.W. 1078, 189 Mo.App. 567.

Mo.App. 1918. Judgment for defendant for costs, entered after verdict for plaintiff for less than the amount for which defendant had offered judgment, is void on the

For references to other topics, see Descriptive-Word Index

face of the record, and so may be attacked by motion to quash execution based thereon; verdict on a new trial, on which plaintiff had final judgment, having been for more.

Stokes v. Henry, 206 S.W. 910.

Mo.App. 1929. Judge must quash execution after motion is filed and judgment creditor notified, if evidence shows full payment of judgment. Rev.St.1919, § 1675, V.A.M.S. § 513.360.

State ex rel. Lane v. Montgomery, 17 S.W.2d 586, 223 Mo.App. 492.

Mo.App. 1930. In order to quash levy for failure to apprise judgment debtor of exemption rights, there must be showing that property levied upon might have been held by debtor as exempt. Rev.St.1919, § 1611, subds. 1, 2, and §§ 1614, 1615, 5860, V.A.M.S. §§ 513.435, 513.440, 513.445, 513.510.

Poplar Bluff Trust Co. v. Bates, 31 S.W.2d 93, 224 Mo.App. 636.

Mo.App. 1930. Where execution is irregularly, unauthorizedly, or prematurely issued, or is unsupported by valid unsatisfied order, decree, or judgment, motion to quash is proper.

Weniger v. Weniger, 32 S.W.2d 773.

A motion to quash an execution issued on a void judgment is the proper procedure, where record shows that judgment is void for want of jurisdiction of court to render it.

Mo.App. 1935. Dewey v. Union Electric Light & Power Co., 83 S.W.2d 203.

Mo.App. 1944. Harrison v. Creason, 176 S.W.2d 849, 238 Mo.App. 118.

Mo.App. 1950. Kennedy v. Boden, 231 S.W.2d 862.

Mo.App. 1952. Lohmann v. Lohmann, 246 S.W.2d 368.

Mo.App. 1937. A transcript execution in favor of assignee of judgment issued July 3, 1935, was not vulnerable to motion to quash on ground that defendant had no notice of assignment, of judgment, where assignment was attached to justice docket April 20, 1935, and original transcript containing assignment was filed for record with circuit clerk May 3, 1935, on which day execution issued was set off against an execution issued on same day on a judgment against plaintiff which had been assigned to defendant, since attachment of assignment to justice record as well as filing of original transcript containing assignment with circuit clerk constituted notice.

Weaver v. Mitchell, 107 S.W.2d 945.

An execution on judgment obtained against landowners by drainage district for drainage taxes, penalty, and attorney's fee was quashable, where district compromised and settled the judgment with landowners before execution was ordered to be issued by attorney whose appointment was revoked by order of county court prior to issuance of execution.

Mo.App. 1938. State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S.W.2d 868, first case.

Mo.App. 1938. State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S.W. 2d 868, second case.

Mo.App. 1938. State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S.W.2d 869.

Mo.App. 1938. State ex rel. Ross, and to Use of Drainage Dist. No. 6 of Pemiscot County, v. Juden, 110 S.W. 2d 870.

Mo.App. 1938. Where there is no infirmity or defect, actual or claimed, in the judgment, execution or levy, prima facie a motion to quash the execution and levy, or either of them, should not be sustained.

Farrell v. Kingshighway Bridge Co., 117 S.W.2d 693.

Mo.App. 1942. When evidence showed a judgment had been fully paid, it was the duty of the judge to quash an execution issued thereon. Rev.St.1939, § 1387, V.A.M.S. § 513.360.

Woods v. Woods, 159 S.W.2d 320, 236 Mo.App. 855.

Mo.App. 1944. Where the variance is slight, between the amount of the judgment due and the amount stated in the execution, the trial court should not interfere, but where the variance is in a substantial amount, it should be corrected. Mo.R.S.A. § 1387, V.A.M.S. § 513.360.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo.App. 873.

Mo.App. 1949. A motion to quash execution must be grounded upon something subsequent to the judgment, and, where the execution substantially pursues the judgment, execution is valid.

Vorhauer v. Sweeney, 217 S.W.2d 985.

Mo.App. 1950. Where judgment for $660.02 was valid only in amount of $408.12, defendant was not entitled to have execution wholly quashed and to be entirely relieved of levy on his property because of the variance, but the variance was so substantial that it should be corrected.

Kennedy v. Boden, 231 S.W.2d 862.

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⇐162. —— Jurisdiction.

Mo.App. 1868. A motion to quash an execution is properly filed in the court from which the execution issued, although prior to the motion the cause has been transferred to another court.

Newton v. Newton, 32 Mo.App. 162.

Mo.App. 1926. Court has jurisdiction of motion to quash execution filed after execution sale, but before return term, and does not lose it by continuance.

Butler Bros. v. Cantwell, 287 S.W. 794.

⇐163. —— Proceedings and determination.

Mo. 1877. Where an application to quash an execution is not made in vacation, it may be made by an ordinary motion, rather than by a petition, under Wag.St. §§ 67–39, relative to executions.

Heuring v. Williams, 65 Mo. 446.

Mo. 1877. Wag.St. p. 792, § 18, provides that, where a judgment shall have been or may hereafter be had in the name of an executor or administrator, execution thereafter may be sued out, or an action thereon be maintained by the administrator de bonis non on his filing in the clerk's office a certified copy of his letters of administration. *Held*, that it would be assumed, on motion to quash the execution, in the absence of any showing to the contrary, that the administrator de bonis non complied with the statute before the issuance of an execution in his favor.

Slagel v. Murdock, 65 Mo. 522.

Mo. 1941. Where judgment, in suit to quiet title and for an accounting allowed interest on amount found to be due to defendant in accounting phase of case, and plaintiff, in his motion for new trial filed in such case, made no complaint with reference to allowance of interest, plaintiff could not thereafter raise question as to allowance of interest on a motion to quash an execution issued against him for balance due on the judgment.

Hoffman v. Hogan, 152 S.W.2d 1046.

Mo.App. 1880. Where the court has jurisdiction of the subject-matter of the action, and the execution issued corresponds to the judgment, which is not appealed from, a motion by one who was duly served with process to quash the execution cannot be sustained; but his remedy, if he has any, is by motion to set aside the judgment.

State, to Use of Bond, v. Berry, 9 Mo. App. 42.

Mo.App. 1881. Motion to quash execution, as raising objection that verdict is not responsive to the issue. See,

Hodgson v. Banking House, 9 Mo.App. 573, memorandum.

Mo.App. 1881. Remedy by motion. See,

Gregory v. Gregory, 10 Mo.App. 589, memorandum.

Mo.App. 1883. Correction of errors on motion to quash execution. See,

Adams v. Tracy, 13 Mo.App. 579, memorandum.

Mo.App. 1886. On a motion to quash an execution, evidence examined, and *held* insufficient to show that the judgment on which the execution was based had been paid.

Sturdevant Bank, to Use of Hartle, v. Peterman, 21 Mo.App. 512.

Mo.App. 1895. Under Rev.St.1889, p. 4967, V.A.M.S. § 513.360, providing that, if any person against whose property any execution shall be issued apply to any judge of the court out of which it has been issued by petition, etc., reasonable notice being given to the opposite party, the judge shall hear the complaint, the application may be made in vacation; such statute not contemplating a petition filed in court.

Johnson v. Greve, 60 Mo.App. 170.

Mo.App. 1902. Where a motion to quash an execution is founded on facts outside the record, they must be established by proof at the hearing.

Hathaway v. St. Louis, K. & S. R. Co., 68 S.W. 109, 94 Mo.App. 343.

A motion to quash an execution filed at a term after judgment has become final is too late to correct error in the judgment itself.

Hathaway v. St. Louis, K. & S. R. Co., 68 S.W. 109, 94 Mo.App. 343.

Mo.App. 1903. On an application to quash an execution levy on real estate, evidence that F. had recovered a judgment against defendant, the lien of which was subsequent to plaintiff's judgment, and, after a levy under F.'s judgment had been quashed, F. prevented the sheriff from setting off defendant's exemption therein, and defendant conveyed the property to F., was irrelevant and immaterial.

Cope v. Snider, 74 S.W. 10, 99 Mo.App. 496.

Mo.App. 1904. A motion to quash an execution, which does not specify any infirmity in the judgment, nor in the proceedings leading up to it, nor any defect or in-

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sufficiency in the execution, does not draw in question the validity of the levy nor authorize the court to quash the levy.

Buzzard v. Robertson, 81 S.W. 914, 107 Mo.App. 557.

Mo.App. 1906. Where a motion to quash an execution was based on the affidavit of the proprietor of a newspaper in which process was published which by mistake failed to show due publication, but evidence was introduced conclusively establishing that due publication was in fact made, the motion was properly denied.

Harbert v. Durden, 92 S.W. 746, 116 Mo. App. 512.

Mo.App. 1911. On motion to quash an execution, a finding that the creditor had agreed to assume the claim involved *held* against the weight of the evidence.

Castle v. Terry, 134 S.W. 78, 154 Mo. App. 213.

Mo.App. 1912. That a foreign corporation is not authorized to do business in the state is an affirmative defense to its right to an execution on a judgment in its favor; and the mere filing of an ex parte affidavit showing noncompliance by the corporation with the statutes, not presented to the court, is insufficient.

Scientific American Club v. Horchitz, 151 S.W. 475, 168 Mo.App. 35.

Mo.App. 1916. A summary proceeding under Rev.St.1909, § 2246, V.A.M.S. § 513.370, for the enforcement of an execution, is purely legal.

R. W. Wallace & Sons Mfg. Co. v. Hagood Mfg. Co., 189 S.W. 32, 196 Mo. App. 40.

Mo.App. 1920. Rev.St.1909, § 2244, V.A.M.S. § 513.370, requiring that petition to judge to stay or quash execution be verified, does not apply to ordinary motions in open court in term time to quash execution.

State ex rel. Jones v. Howe Scale Co. of Illinois, 218 S.W. 359, 203 Mo.App. 350.

Mo.App. 1931. Refusal to quash execution on judgment sustaining judgment of justice court on ground that justice failed to enter it on docket *held* not error, in absence of proof of such fact, where transcript showed rendition thereof. Rev.St.1929, § 2177, V.A.M.S. § 483.085.

State Bank of Sugar Creek v. Anderson, 36 S.W.2d 138, 225 Mo.App. 118.

Mo.App. 1932. Whether conveyance of realty after judgment lien had expired vested title in grantee cannot be tried on motion to quash execution thereon. Rev.St.1929, § 1105, V.A.M.S. § 511.360.

Kelley v. Parman, 51 S.W.2d 231.

Mo.App. 1938. The statute authorizing proceedings to quash execution manifests intent to permit an application to the judge, at chambers or in vacation, to stay proceedings until he can hear motion to quash in term time. Mo.St.Ann. § 1223 et seq., p. 1456 et seq., V.A.M.S. § 513.360 et seq.

O'Neal v. Milburn, 112 S.W.2d 124.

Mo.App. 1940. A company which formerly owned interest in notes secured by deed of trust and was a party in suit for enforcement of taxes, but had parted with such interest, was not a "necessary party" to motion to quash execution obtained by assignee of judgment rendered in the suit.

State ex rel. Gilkison v. Andrews, 133 S.W.2d 695.

Where former owner of interest in notes secured by deed of trust had parted with such interest, presence of such former owner as a party to motion to quash execution obtained by assignee of judgment rendered in the suit did not harm such assignee and hence did not preclude granting the motion.

State ex rel. Gilkison v. Andrews, 133 S.W.2d 695.

Mo.App. 1940. On motion by motor carrier to quash execution issued on judgment against carrier, which shipper had assigned to carrier's insurer "for value received," inference arose that judgment was paid in money and hence trial court did not err in sustaining motion to quash on ground, as contended by insurer, that motion pleaded a payment of the judgment and that there was no proof of payment.

Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

On motion by motor carrier to quash execution issued on judgment against carrier, which shipper had assigned to carrier's insurer "for value received," trial court did not err in quashing execution on ground that there was no evidence that mare which was described in the suit, and for the death of which shipper obtained the judgment against the carrier, was transported in trucks specifically mentioned in policy or in any other motor vehicle for which the Public Service Commission had issued a permit or certificate, where endorsement on policy provided that policy covered damage to loss of cargo while in possession of and under control of insured.

Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

On motion by motor carrier to quash execution issued on judgment against carrier which shipper had assigned to carrier's insurer "for value received," trial court did not err in admitting policy issued to carrier and in admitting rules of the Public Service Commission, as against objection that they did not tend to prove or disprove any issue, since they tended to establish insurer's obligation to pay the judgment against carrier.

Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

Mo.App. 1943. Though plaintiff's testimony was somewhat in conflict with the justice's record, the circuit court properly denied plaintiff's motion to quash the transcript and execution in a replevin action, where the justice's record showed a change of venue, and that plaintiff waived the statutory notice of trial and the requirement that the cause be set for trial within 20 days, and consented that the cause be set for trial on May 5, and later requested a continuance until May 20. Mo.R.S.A. §§ 2642, 2646, V.A.M.S. §§ 517.530 note, 517.580 note.

Standard Electrical Co. v. Lugar, 175 S.W.2d 58, 237 Mo.App. 1281.

Mo.App. 1944. The statute relating to proceedings to set aside or quash an execution affords a remedy to a judgment debtor during vacation of court by authorizing a judge in vacation to stay or quash an execution, but does not preclude a motion in open court for the same purpose and provides an adequate remedy at law for staying, setting aside, or quashing an execution. Mo.R.S.A. § 1387, V.A.M.S. § 513.360.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo. App. 873.

Since trial court must quash an execution issued on a paid judgment, an execution for an amount in excess of the amount due on a judgment should be quashed to the extent of the excess, and be permitted to stand only as to the amount shown to be accrued and unpaid when the execution was issued. Mo.R.S.A. § 1387, V.A.M.S. § 513.360.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo. App. 873.

Execution is intended for the purpose of enforcing and collecting a judgment and a judgment debtor is not entitled to have an execution wholly quashed and be thereby entirely relieved of the levy on his property under execution and garnishment merely because of a variance in the amount of the judgment due and the amount stated in the execution when it was issued. Mo.R.S.A. § 1387, V.A.M.S. § 513.360.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo. App. 873.

Mo.App. 1947. The burden of sustaining judgment debtor's motion to quash writ of execution on the ground of payment rests upon judgment debtor. Mo.R.S.A. § 1387, V.A.M.S. § 513.360.

Cervantes v. Cervantes, 203 S.W.2d 143, 239 Mo.App. 932.

Mo.App. 1949. Question whether evidence was sufficient to support default judgment could not be inquired into on motion to quash an execution.

Baumgartner v. Cloud, 218 S.W.2d 793.

⇐164-168.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐169. Injunction.

⇐170. —— In general.

Mo.App. 1883. A defendant in a forcible entry and detainer action tried before a justice of the peace, who seeks an injunction restraining the plaintiff therein from enforcing the execution issued on the judgment in his favor, waives the irregularities in the action; Rev.St.1879, § 2709, providing that every injunction staying proceedings shall operate as a release of all errors in the proceedings that are prayed to be enjoined.

Cabanne v. Spaulding, 14 Mo.App. 312.

Mo.App. 1941. The statute authorizing injunctive relief against a proposed execution sale of realty is not intended to be a means of depriving a judgment creditor of a fraudulent grantor from the right to proceed under execution against land fraudulently conveyed for purpose of hindering or delaying such judgment creditor. Rev.St.1939, § 1683, Mo. St.Ann. § 1519, p. 1672, V.A.M.S. § 526.030.

Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.

In action for injunctive relief against proposed execution sale of realty, if property has been conveyed to plaintiff by judgment debtor in fraud of defendant as judgment creditor, an injunction will not be granted, and defendant will be permitted to proceed with sale as though there had been no such conveyance. Rev.St.1939, §§ 1683, 3507, Mo.St.Ann. §§ 1519, 3117, pp. 1672, 1946, V.A.M.S. §§ 428.020, 526.030.

Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.

Mo.App. 1952. Statutes prescribing procedure to be followed by property owner to stay or set aside execution or order of sale, taken into consideration with statute specifying the only circumstances in which remedy of injunction may be utilized to stop an exe-

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cution sale, reveal legislative intent to limit and restrict use of injunction in execution sales to circumstances set forth in statute, and to require all other applications for staying, setting aside or quashing of executions to be made by way of motion to quash. V.A.M.S. §§ 513.360, 513.365, 526.030.

State ex rel. Mathas v. Brackman, 243 S.W.2d 793.

⇐171. —— Grounds.

⇐171(1). In general.

D.C.Mo. 1933. Facts which clearly show that execution of judgment is against conscience, and that injured party could not have obtained relief or was prevented, without fault, from doing so, justify application for injunction against enforcement.

Harrington v. Denny, 3 F.Supp. 584.

Mo. 1937. Ordinarily, injunction will lie to restrain a sale under execution against one having no interest in real estate seized. Mo.St.Ann. § 1519, p. 1672, V.A.M.S. § 446.320.

Macklind Inv. Co. v. Ferry, 108 S.W.2d 21, 341 Mo. 493.

Mo.App. 1895. The enforcement of a judgment will not be restrained on the ground that the execution is being levied on property which cannot be replaced; it not appearing that the property is not exempt from the execution.

Herwick v. Koken Barber Supply Co., 61 Mo.App. 454.

Mo.App. 1929. Suit to set aside judgment transcribed from justice's court, and restrain execution for falsity of return of special deputy appointed by justice, *held* not maintainable on ground of false return. Rev. St.1919, §§ 1675, 2747, V.A.M.S. §§ 513.360, 517.100 note.

Jones v. Overall, 13 S.W.2d 581, 223 Mo. App. 266.

⇐171(2). Existence and adequacy of other remedy and irreparable injury.

Mo. 1875. A settlement of the testator's estate was assented to by the person subsequently appointed executor, and ratified by the probate court in vacation, and such ratification was subsequently confirmed by the court in term time. *Held*, that equity would not interfere by injunction to prevent an execution sale under such confirmation; there being no allegation of fraud or accident, or danger of irreparable damage, or cloud on title by sale of realty. In such case a party interested had his remedy at law by motion to quash the execution.

Stockton v. Ransom, 60 Mo. 535.

Mo. 1879. Though a school board may have remedy at law, this does not prevent it from enjoining a sale of its property under execution.

State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am.Rep. 498.

Mo. 1897. The collection of an execution issued on a void judgment will not be enjoined, the remedy at law being adequate.

St. Louis & S. F. Ry. Co. v. Lowder, 38 S.W. 550, modified 39 S.W. 799, 138 Mo. 533, 60 Am.St.Rep. 565.

Mo. 1911. Under Rev.St.1909, § 2206, V.A.M.S. § 513.210, making it the duty of a sheriff in selling land under execution to subdivide it and sell only enough to satisfy the debt, and section 2207, § 513.100, giving the execution defendant the right to elect the part he wants sold first, where lands levied on are incumbered, the amount of incumbrances not being shown, the levy of execution will not be enjoined; the debtor having the remedy, in case of violation of duty by the sheriff in making the sale, by motion to set aside the sale.

Cantwell v. Johnson, 139 S.W. 365, 236 Mo. 575.

Mo.App. 1910. Injunction will not lie to restrain further proceedings by a constable on an execution levied by him, though the execution was issued after the judgment was superseded by a perfected appeal, and the levy was under such circumstances that the constable would not be liable for damages; there being an adequate remedy at law, by replevin for the property.

Ostmann v. Frey, 128 S.W. 257, 148 Mo. App. 284.

Mo.App. 1914. An injunction is not the proper remedy to enjoin a threatened sale of personalty under execution or other process, if there is no judgment on which to base the process; the legal remedy being adequate.

Farris v. Smithpeter, 166 S.W. 655, 180 Mo.App. 466.

Mo.App. 1915. Under Rev.St.1909, §§ 2534, 8308, 8309, V.A.M.S. §§ 451.250, 451.260, 526.030, equity can enjoin the sale of a wife's property under execution against her husband where there is no adequate remedy at law.

Mathias v. Arnold, 178 S.W. 264, 191 Mo. App. 352.

Mo.App. 1944. The statute relating to proceedings to set aside or quash an execution affords a remedy to a judgment debtor during vacation of court by authorizing a judge in vacation to stay or quash an execution, but does not preclude a motion in open court for the same purpose and provides an adequate remedy at law for staying, set-

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ting aside, or quashing an execution. Mo. R.S.A. § 1387, V.A.M.S. § 513.360.

Pflanz v. Pflanz, 177 S.W.2d 631, 237 Mo.App. 873.

Mo.App. 1945. Where execution had been issued on a judgment void on its face, the alleged judgment debtor had a complete and adequate remedy at law by moving to quash the execution, precluding resort to injunctive relief.

Boysen v. McCullough, 185 S.W.2d 824, 238 Mo.App. 594.

⇐171(3). Attack on judgment or execution.

Mo.App. 1905. Injunction will issue to restrain the sale of land under an execution issued on a judgment, which may be shown by extrinsic facts, but which does not appear from the record to be void.

Henman v. Westheimer, 85 S.W. 101, 110 Mo.App. 191.

Mo.App. 1945. A sheriff cannot be enjoined from making a levy by virtue of an execution issued upon a judgment void on its face.

Boysen v. McCullough, 185 S.W.2d 824, 238 Mo.App. 594.

⇐171 (4). Claim of property by third person, and cloud on title.

Injunction will not lie to stay an execution sale simply on the ground that it will pass no title and may cast a cloud on the title of the true owner.

Mo. 1858. Drake v. Jones, 27 Mo. 428.

Mo. 1871. Kuhn v. McNeil, 47 Mo. 389.

Mo. 1880. A judgment debtor held the legal title to land, but in trust for a third person. The judgment debtor knew the facts, but pretended that the judgment was a lien on the property, and directed the sheriff to levy on and sell the property under the execution against the judgment debtor. The sheriff levied on the premises and advertised the same for sale. *Held*, that equity would restrain the sale.

South Presbyterian Church v. Hintze, 72 Mo. 363.

Mo. 1888. Equity will, at the suit of persons holding the complete equitable title to land, restrain as to their estate the levy of an execution issued on a judgment against the person holding the legal title.

Parks v. People's Bank, 11 S.W. 41, 97 Mo. 130, 10 Am.St.Rep. 295.

Mo. 1892. A sale under a judgment in an action to enforce a mechanic's lien will not be enjoined on the ground that it is void for want of jurisdiction, as appears from facts necessarily matters of record in the lien case, as in such case plaintiff cannot be injured by the sale.

Russell v. Interstate Lumber Co., 20 S. W. 26, 112 Mo. 40.

Mo.App. 1888. While a defendant in ejectment might defend on the strength of an equitable title, it is, to say the least, doubtful how far he could successfully defend upon the strength of a mere equitable title against the purchaser at an execution sale without notice of such equitable right, and therefore it seems that injunction will lie to restrain such sale.

Parks v. People's Bank, 31 Mo.App. 12.

Mo.App. 1889. A wife cannot by a suit in equity restrain a sale under execution of her husband's interest in land which he conveyed to her prior to the judgment on which the execution was issued.

Good v. Merhowitz, 35 Mo.App. 658.

Mo.App. 1890. A court of chancery will enjoin a sale under a judgment which in its effect would cast a cloud on title to real estate, although the sale sought to be enjoined would convey no title.

Clifton v. Anderson, 40 Mo.App. 616.

Mo.App. 1905. Where plaintiff's grandfather, with his funds and funds of plaintiff, for the purpose of providing her a home, bought a house, but from ignorance or oversight failed to have the conveyance made to her, having it instead made to her husband, she has an equity therein, which will be protected by injunction against sale of the property on defendant's execution against plaintiff's husband; defendant not having given the husband credit on the faith that he owned the property.

Neeley v. Bank of Independence, 89 S.W. 907, 114 Mo.App. 467.

Mo.App. 1911. Where an execution debtor has in good faith transferred land to his wife to invest in her the title to property purchased with her separate money, she is entitled to injunction against the sale of the property under execution against him, under Rev.St.1909, § 2534, V.A.M.S. § 526.030, providing that injunction will lie in cases where a cloud would be put on the title of real estate being sold under execution against a person having no interest therein at the time of sale.

Carrell v. Meek, 137 S.W. 19, 155 Mo. App. 337.

Mo.App. 1912. Notwithstanding Rev.St. 1909, § 2534, V.A.M.S. § 526.030, sale under execution against husband of land of wife will not be enjoined.

Taylor v. Swearingen, 144 S.W. 160, 161 Mo.App. 467.

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Mo.App. 1917. Where defendant sued plaintiff's grantor, a nonresident, on ground that conveyance was made to "hinder, defraud, and delay his creditors," and execution issued and levy was made upon plaintiff's land, plaintiff was entitled to a trial as to facts on petition to enjoin sale under Rev. St.1909, § 2534, V.A.M.S. § 526.030, allowing injunction where a sale under execution would cast a cloud on the title.

Long v. Palisades Bank, 198 S.W. 1129.

Mo.App. 1921. Under Rev.St.1919, § 1969, V.A.M.S. § 526.030 an owner of land may enjoin an execution issued against a stranger from being levied on his land if a sale and deed under it will cast a cloud on his title, but, in order that a cloud may be cast upon the title of a record owner in possession so as to call for equitable relief, the title, lien, or claim which is asserted to cast such a cloud must be one apparently valid upon the face of the record, requiring resort to extrinsic evidence to establish its invalidity, and an injunction will not lie to restrain the sale of land under an execution issued upon a void judgment.

Marsala v. Gentry, 232 S.W. 1046.

A judgment against one in the wrong name, who was not served, is null and void, and an execution sale and sheriff's deed executed thereunder will not cast such a cloud on title as to authorize an injunction restraining a sale under execution, under Rev.St. 1919, § 1969, V.A.M.S. § 526.030.

Marsala v. Gentry, 232 S.W. 1046.

Mo.App. 1922. Injunction will lie to stay an execution sale on the ground that it will pass no title and may cast a cloud on the title of the true owner.

Hunter Land & Development Co. v. Jackson, 243 S.W. 436.

Mo.App. 1941. Prior to 1899 amendment to statute authorizing injunctive relief against proposed execution sale of realty, a suit could be maintained to enjoin the sale of land by virtue of an execution on a judgment against one having no interest in the land subject to execution at the time of the sale only when owner's title was not perfect and complete, and execution debtor had some apparent interest in land so as to make it necessary that owner produce evidence extrinsic to record in order to support his own title and defeat a recovery by purchaser at execution sale, but since the amendment a suit may be maintained regardless whether defense of the title against execution purchaser would depend upon extrinsic evidence, or whether no title or apparent title would pass by virtue of the sale. Rev.St.1939, § 1683, Mo.St.Ann. § 1519, p. 1672, V.A.M.S. § 526.030.

Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.

A petition which alleged that plaintiff was sole owner and in possession of realty, that he had not been a party to action in which judgment was rendered against execution debtor, and that execution debtor did not then, or at time of rendition of the judgment, have any interest in realty, although her name had appeared of record in chain of title to property between years 1932 and 1935, stated a cause of action for injunctive relief against proposed execution sale, notwithstanding that plaintiff did not plead a record transfer to himself from execution debtor, nor plead that he was record owner of the property. Rev.St.1939, § 1683, Mo.St.Ann. § 1519, p. 1672, V.A.M.S. § 526.030.

Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.

Mo.App. 1942. Since neither wife's separate estate in realty, nor estate by entirety held by her and her husband in other realty, could be reached by judgment creditor of husband alone, spouses' conveyance of such properties to their daughters was not in fraud of such creditor, regardless of spouses' motive and consideration paid by daughters, who were entitled to injunction against sale thereof under execution on judgment, as such sale would put cloud on daughters' title. R.S.1939, §§ 319, 1683, V.A.M.S. §§ 469.020, 526.030.

Maender v. Breck, 159 S.W.2d 310.

⇐172. — Actions to restrain execution.

⇐172 (1). Nature and form of remedy and jurisdiction.

Mo. 1894. Under the statute, Rev.St. 1889, § 4967, V.A.M.S. § 513.360, and the general law, the court from which an execution issues has the exclusive right to control it, and no other court has a right to interfere therewith by injunction.

Scrutchfield v. Sauter, 24 S.W. 137, 119 Mo. 615.

Mo.App. 1888. In a suit by the equitable owner of lands to restrain an execution sale for a debt of the former owner, defendant went to trial on the issues without interposing a demurrer on the ground that plaintiffs had an adequate remedy in ejectment. *Held* that, assuming that plaintiffs might defend successfully in an action of ejectment, their defense would be purely equitable, and would have to be tried before the same tribunal which passed upon the right to injunction, and upon the identical facts passed upon by the judge in rendering the decree therein, and

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therefore, even if the proceedings were had upon an erroneous theory, the judgment should not be reversed.

Parks v. People's Bank, 31 Mo.App. 12.

Mo.App. 1930. Where injunction is sought to restrain execution sale, court will determine character and force of judgment to determine equitable circumstances. Rev.St. 1919, § 1969, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

Plaintiffs *held* not entitled to injunction restraining execution sale, where defect in their deeds affirmatively appeared and deeds were void as to creditors. Rev.St.1919, § 1969, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

⇐172 (2). Time for proceedings. laches, and conditions precedent.

Mo. 1888. In a suit by persons holding the equitable title to land to restrain the levy of an execution issued on a judgment against the person holding the legal title, the answer averred that the lien of the judgment attached to the land prior to the acquirement by plaintiffs of any legal interest or lien; that defendant was solvent; that before rendition of the judgment any right or claim of plaintiffs thereto was entirely unknown to defendant; that the judgment was on a note executed by the judgment debtor and others, and was purchased by defendant before maturity, with the information and belief that the judgment debtor had a fee simple in the land, unincumbered by any liens or claims, and with reliance on such belief; and that the negligence and laches of plaintiff lulled defendant into the belief that the land was good for the note and judgment. *Held*, that the matter alleged constituted no defense.

Parks v. People's Bank, 11 S.W. 41, 97 Mo. 130, 10 Am.St.Rep. 295.

⇐172 (3). Persons entitled and parties to proceedings.

Mo. 1875. Where property is seized on execution, a bill to enjoin the sale which makes the plaintiff in execution the sole defendant is as effectual as though the officer was made a party and included in the decree.

Holthaus v. Hornbostle, 60 Mo. 439.

Mo. 1886. Under the statute providing that actions of ejectment "shall be brought against the person in possession of the premises claimed," and section 2247 of that statute, declaring that a plaintiff, in order to recover in ejectment, must "show that, at the time of the commencement of the action, the defendant was in the possession of the premises claimed," a court of equity will restrain the execution of a writ of habere facias possessionem, issued in pursuance of a judgment in ejectment rendered by default against a nonresident owner of lands served by publication, and whose tenant in actual possession of the lands was not served with process, upon the petition of the grantee of the nonresident owner who bought the lands without notice of the action.

Charter Oak Ins. Co. v. Cummings, 2 S. W. 397, 90 Mo. 267.

Mo. 1894. A person holding an equity of redemption in his homestead has an interest therein sufficient to restrain its sale under execution.

Ingraham v. Dyer, 28 S.W. 840, 125 Mo. 491.

Mo. 1905. Plaintiffs, being the holders of mortgages on certain cattle, delivered them to their assignor for collection; and in replevin, brought in the name of such assignor, plaintiffs procured a bond, and agreed to indemnify the sureties. The cattle were sold after being taken under the writ for $4,500, but judgment was rendered against the plaintiffs' assignor, in the replevin suit for $6,000, the value of the cattle, on the ground that plaintiffs' assignor had no capacity to maintain replevin, which judgment was subsequently acquired without consideration by defendants, who had purchased the cattle from a fraudulent vendee of the mortgagor under a title subsequent to the mortgages. *Held*, that the judgment against plaintiffs' assignor in the replevin suit represented the cattle, and that plaintiffs, being entitled thereto, were entitled in equity to an injunction restraining defendants from enforcing such judgment.

Tootle v. Buckingham, 88 S.W. 619, 190 Mo. 183.

⇐172 (4). Pleading and evidence.

Mo. 1911. Where plaintiff seeks to enjoin a levy of an execution on land on the ground that the levy is excessive, evidence of the value of plaintiff's equity in the land above incumbrances is properly excluded.

Cantwell v. Johnson, 139 S.W. 365, 236 Mo. 575.

Mo. 1945. In action by mortgagor's daughter and son-in-law who purchased at foreclosure sale to enjoin sale under execution or other assertion of claim against the mortgaged property based on a judgment against mortgagor, evidence did not make a prima facie case to sustain defense that foreclosure was based on fictitious grounds or induced by collusion.

Talley v. Richart, 185 S.W.2d 23.

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Mo.App. 1893. A petition alleged that L. sold a piano to M., a married woman, taking in payment certain notes secured by a mortgage; that M. sold the piano to defendant, who took it with knowledge that its purchase price was not paid, and on maturity of the mortgage notes plaintiff replevied the piano, but was defeated in the action; and that defendant in such suit elected to take the value of the piano, and that execution for such value was issued against plaintiff; and it was alleged that plaintiff had recovered judgment against M. on the notes, but that such judgment could not be levied on the piano, because defendant refused to take it in the replevin suit, and plaintiff sought to have the execution against him in the replevin suit enjoined. *Held*, that plaintiff was not entitled to the relief sought; the petition not stating that the conveyance of the piano to defendant was fraudulent, and it not negativing the fact that M. had property out of which an execution against her could be made.

Lippmann v. Campbell, 53 Mo.App. 121.

Mo.App. 1915. A petition for an injunction to restrain the sale of a wife's property under execution against her husband under Rev.St.1909, §§ 2534, 8308, 8309, V.A.M.S. §§ 451.250, 451.260, 526.030, need not allege with particularity the injurious consequences which will result from the sale.

Mathias v. Arnold, 178 S.W. 264, 191 Mo. App. 352.

Mo.App. 1930. Amended petition, in action to restrain pending execution sale, showing title based upon deed from corporation executed subsequent to forfeiture of charter, *held* insufficient. Rev.St.1919, § 1969, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

Evidence, in action to restrain execution sale, showing noncompliance with statute for forfeiture of corporate charter and privileges by complying with provisions thereof, held insufficient to show nonexistence of corporation when defendants obtained judgment. Rev.St.1919, § 1969; Laws 1913, p. 169, §§ 8, 10, 12, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

Mo.App. 1934. Evidence established that judgment of justice of peace had been revived within three years of its rendition so as to authorize execution thereon.

Gierster v. Stephens, 74 S.W.2d 88.

⇐172 (5). Hearing, determination, and relief.

C.C.Mo. 1884. A. died testate, leaving his property, some of which was situated in Missouri and some in Pennsylvania, to his children, B., C., D., and E. Letters of administration were taken out upon his estate in Missouri by B., and in Pennsylvania by C. The devisees agreed to depart from the plan of division contained in their father's will, and B. put the real property situated in Missouri up at public sale, under an agreement with the other devisees that certain specific tracts, and such other tracts as it should be deemed advisable to bid in, should be bid in, and subsequently appraised and divided between said devisees. In the execution of this plan a certain tract fell to B.'s share, and was conveyed by him to D. in trust for B.'s children, by an absolute deed, but under an oral agreement that it should be held in trust. B. then took possession for his children, who were minors. He was then indebted to the estate. Later D. conveyed said tract to C., who brought suit in ejectment against B., and recovered judgment. A judgment has been rendered against B. in favor of A.'s estate in a probate court of Missouri, which, upon appeal, was reduced, but which has been taken to the supreme court of Missouri by a writ of error, and is now pending there. Complainants claim that C. has been allowed an improper credit in a settlement made by him in an orphans' court of Pennsylvania. Because of the questions as to said judgments, it is uncertain whether the interest of B. in A.'s estate, after deducting the amount he owes the estate, is or is not equal to the value of the land conveyed in trust for his children. In a suit to restrain the issuing of an execution upon the judgment in said ejectment suit, and to obtain a decree ordering C. to convey said land to said children, *held* that, inasmuch as the amount of B.'s interest in A.'s estate cannot be ascertained under the evidence, no relief can be granted in this suit.

Albright v. Oyster, 22 F. 628, reversed 11 S.Ct. 916, 140 U.S. 493, 35 L.Ed. 534.

Mo.App. 1930. Decree permanently and perpetually restraining judgment creditor from doing any act or thing under judgment and execution, or under any other execution, *held* erroneous. Rev.St.1919, § 1969, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

Where deeds, on which plaintiffs' right to restrain execution sale were based, were void, defendants *held* entitled to have deed declared void without resorting to independent suit. Rev.St.1919, § 1969, V.A.M.S. § 526.030.

Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred 7 S.W.2d 348, 320 Mo. 310.

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⇐172 (6). Temporary injunction.

Mo.App. 1918. Where temporary injunction against sale on execution did not annul the levy, but only temporarily restrained the sheriff, after injunction was dissolved, the sheriff properly proceeded with the sale without making a second levy.

Mayes v. Cunningham, 204 S.W. 404.

⇐172 (7). Damages and costs on dissolving injunction.

Mo.App. 1931. One whose legal rights have been invaded by unjust restraint of execution sale may have damages directly occasioned thereby, assessed against bond.

Weil v. Richardson, 35 S.W.2d 369, 225 Mo.App. 1237.

⇐173. Voluntary withdrawal or countermand.

For cases from other jurisdictions, see other Key Number Digests.

⇐174. Effect of stay or suspension.

Mo. 1872. A stay of execution under judgment on an attachment does not have the effect of removing or postponing the lien as to lands.

Ensworth v. King, 50 Mo. 477.

⇐175. Effect of quashing or setting aside.

Mo.App. 1918. If an execution is quashed, necessarily levy thereunder falls with it.

People's Savings Bank v. McDowell, 204 S.W. 406.

⇐176-177.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

VI. CLAIMS BY THIRD PERSONS.

⇐178. Intervention in general.

Mo. 1883. One who is not a party to an action in which judgment has been rendered and execution issued and levied on his property cannot appear in the action and move to set aside the execution and levy, since the sale of the property under the execution cannot affect his rights, and the parties to the action are entitled to a trial by jury on the issue of title.

State ex rel. Carter v. Clymer, 81 Mo. 122.

⇐179. Claims or liens prior or superior to execution.

Mo. 1918. In view of V.A.M.S. Const. art. 9, § 25, and Laws 1877, p. 187, the general law, Rev.St.1909, § 2204, V.A.M.S. § 513.-130, rather than the special law applicable to St. Louis county, Rev.St.1899, p. 2251, V. A.M.S. § 560.375, controls as to requirements of third party claims to property levied on by the sheriff of the city under writ of execution. Per Williams, Woodson, and Blair, JJ.; Graves, C. J., and Faris, J., expressly dissenting.

State ex rel. Missouri Poultry & Game Co. v. Nolte, 203 S.W. 956, reversing judgment State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, 187 S.W. 896.

⇐180. Rights of claimants of property.

⇐181. —— In general.

Mo. 1876. Wag.St. p. 842, providing that, when property levied upon is claimed by any person other than the defendant in the execution, the constable shall summon a jury to try the right of property, does not authorize a trial of the right of property where execution is levied upon property as partnership property, and it is claimed as individual property by one of the partners.

Pierce v. Kingsbury, 63 Mo. 259.

Mo. 1902. Where goods had been sold by invoice, and part payment had been made, and the goods were levied upon as the property of a third person before the invoice had been completed, the parties to the sale, as between themselves, had a right to rescind the sale; and the rights of the execution creditor were not affected by such rescission, and he could not claim that the rights of the seller were secured after the levy, so as to bar the seller from claiming the goods as against the execution.

State ex rel. McLain v. Jenkins, 70 S.W. 152, 170 Mo. 16.

Mo.App. 1885. Rev.St.1879, § 2366, declares that property seized under execution may be delivered to a claimant other than the execution defendant by the giving of a delivery bond. Section 2367 provides that such bonds shall be returned into court with the execution on the first day of the next term, and the clerk shall enter the matter on the docket as civil cases are docketed, and it shall be tried at the term at which the claim is returned, etc. Property belonging to a married woman was seized under execution under a judgment against her husband for "necessaries" for the wife and family. *Held*, that the wife was not the owner of the property liable to be seized under the execution, so as to be unable to make claim.

Houx v. Shaw, 18 Mo.App. 45.

Mo.App. 1890. Rev.St. § 2366, provides that when any personal property or other effects shall be seized by any execution, and any one other than the debtor in the execution shall claim the property, etc.; and sec-

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tion 2367 provides for the pleadings and practice in case of such a claim, and provides that it shall be governed, so far as practicable, by the law relating to the same in civil actions, which proceedings are quite analogous to those of the statutory action for claim and delivery of personal property. *Held* that, where one for consideration gives another a license to remove growing timber from the lands of the licensor within a reasonable time, such agreement does not have the effect of converting the growing timber into personal property, so as to render sections 2366 and 2367 applicable to a case where the execution is levied on the growing timber.

Potter v. Everett, 40 Mo.App. 152.

Mo.App. 1897. The scope of Rev.St. § 4928, V.A.M.S. § 513.135, is to try the rights of property levied on and to make orders and to render judgments concerning it. If, after taking an indemnifying bond, on the failure of the claimant to give a delivery bond, the officer gives the statutory notice, and sells under the execution, and pays the proceeds to the execution creditor, as he is bound to do, there is nothing left to be tried under said section; and it seems that, when the claimant has so failed to give a delivery bond after taking an indemnifying bond from the execution creditor by the sheriff, this failure on his part is tantamount to a waiver of his privilege to have the rights of property tried in the summary manner provided by this section, and an election on his part to let the property sell under the execution and to rely upon some of his other legal remedies for redress.

Williamson v. Bank of Curryville, 69 Mo. App. 368.

Mo.App. 1928. Equitable lien by one in possession of property, or entitled thereto, affords basis for claim to property held under levy. Rev.St.1919, §§ 1635, 1636, V.A.M.S. §§ 513.130, 513.135.

Langford v. Fanning, 7 S.W.2d 726.

⇐182. —— Attack on judgment or execution.

Mo. 1932. Where grantee of property, subject to judgment sustaining attachment, did not question irregularity in special execution issued to satisfy judgment notwithstanding full opportunity to protect rights, grantee *held* not entitled to complain of irregularities which merely rendered execution sale voidable. Rev.St.1929, § 1331, V.A.M.S. § 521.560.

Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

⇐183. Time for interposing claim.

Mo.App. 1942. Where intervener claiming title to an automobile knew that it had been attached in an action against his transferor and all court proceedings had therein, including trial on the merits, judgment, order of sale, sale under special execution, order of distribution, and satisfaction of judgment, and asserted no claim until after the suit had fully terminated, interpleader was filed too late, and intervener "waived" any right he may have had to the automobile.

Eveloff v. Cram, 161 S.W.2d 36, 236 Mo.App. 1013.

⇐184. Notice or demand by claimant, and affidavit of claim.

Mo.App. 1876. An objection to the sufficiency of a notice of claim served on an officer levying an execution cannot be raised after the giving of an indemnifying bond to the officer.

State, to Use of Gannett, v. Johnson, 1 Mo.App. 219.

Mo.App. 1909. A mortgagee of property levied on as the property of the mortgagor was not required to give notice of his interest to the constable, as authorized by Rev.St. 1899, § 4043, Ann.St.1906, p. 2201, V.A.M.S. § 513.130. The mortgagee had the remedy by replevin or by notice to the constable under such section, but could not pursue both, so that giving notice before suing in replevin would have deprived him of his right to replevin.

Studebaker Bros. Mfg. Co. v. Davis, 119 S.W. 532, 137 Mo.App. 58.

Mo.App. 1918. Where third person verbally claimed property taken under execution, and sheriff required indemnifying bond, such person *held* not limited to action on bond, not having complied with Rev.St.1909, §§ 2204, 2205, 7551, 7553, V.A.M.S. §§ 513.130, 513.135, requiring written claims.

Lamb v. Stubblefield, 200 S.W. 695.

Mo.App. 1926. Object of affidavit of ownership is to notify officer enforcing execution that others than judgment debtor own property.

Long v. Robinson, 281 S.W. 78, 222 Mo. App. 503.

⇐185. Security by claimant for possession.

Mo. 1851. Where a claimant of property on which an execution had been levied signed a bond for its delivery, he will not be allowed to assert his claim to the property after forfeiture of the bond.

Page v. Butler, 15 Mo. 73.

Mo.App. 1894. Where, after a third person had made a written claim to property levied on under an execution, an indemnity bond was given and the property sold under

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the execution, such sale did not transfer the title of such claimant, so as to prevent a retaking of the property by him.

Hanson v. McKerrall, 57 Mo.App. 56.

Mo.App. 1894. Where the claimant of property levied on has given the constable notice of his claim, as provided for in Rev. St. § 6311, V.A.M.S. § 513.130 note, and has taken from the constable a bond of indemnity, he is barred of his right of action in replevin against the constable's custodian of the property.

Talbot v. Magee, 59 Mo.App. 347.

Mo.App. 1895. The right of a person, claiming property which had been sold under an execution against another person, to assert title to the property against the purchaser at the execution sale, was not prejudiced by the fact that the sheriff proceeded with the sale under a bond for indemnification.

Appleman v. American Sporting Goods Co., 64 Mo.App. 71.

⇐186. Actions by claimant for recovery of possession.

Mo.App. 1908. Where, in replevin for property taken on levy of execution, it appeared that plaintiff at the time of the levy was rightfully in possession of the property as executor and trustee under the will of a decedent, who, when she died, was in possession claiming the property as her own, and defendants had no right to the property, except on the theory that it was subject to levy for a judgment against plaintiff, a judgment for defendants could not be sustained, where the judgment on which execution issued would not support a valid execution.

Dreyer v. Dickman, 111 S.W. 616, 131 Mo. App. 660.

Mo.App. 1908. Plaintiff replevied a horse, one of defendants being an execution debtor and the other a constable who had levied an execution on the horse for a certain sum. Plaintiff failed to maintain her action, and judgment was given for the constable, but was restricted by a clause that it was to be levied only on the specific personal property described. The judgment was thereafter modified and the latter clause omitted, but, as modified, it gave the constable judgment for recovery of the property, and, if plaintiff refused to deliver the property to the constable, he should have the right to take immediate possession of it, or recover the amount of his execution on plaintiff's replevin bond. *Held*, that the judgment as entered was proper, and afforded but slight ground for criticism under the facts.

Dallas v. Hansford, 111 S.W. 870, 132 Mo.App. 303.

Mo.App. 1909. In replevin for property levied on under execution against another, the defense that plaintiff had elected to rely on the remedy, under Rev.St.1899, § 4043, Ann.St.1906, p. 2201, V.A.M.S. § 513.130, allowing an owner to file an affidavit of ownership with the levying officer, is not made out, unless it is shown that the affidavit contained the averments required by the statute.

Kesse v. Wilson, 119 S.W. 508, 139 Mo. App. 1.

Where the claimant to property levied on under execution against another gives the notice of claim required by Rev.St.1899, § 4043, Ann.St.1906, p. 2201, V.A.M.S. § 513.130, and the officer takes indemnity, claimant will be held to have elected to pursue the statutory remedy, rather than to replevy the property or sue the officer for damages.

Kesse v. Wilson, 119 S.W. 508, 139 Mo. App. 1.

⇐187. Proceedings for establishment and determination of claims.

⇐188. —— Nature and form of remedy.

Under Act March 3, 1855, Sess. Acts 1855, p. 464, concerning the levy of executions, the claimant, without making claim to the property levied on in the manner provided for in the act, may maintain an action against the officer for the possession of that property.

Mo. 1859. Bradley v. Holloway, 28 Mo. 150.

Mo. 1859. St. Louis, A. & C. R. Co. v. Castello, 28 Mo. 379.

Mo. 1873. Under Rev.Code 1865, Wag. St. p. 608, § 29, dispensing with the notice to the sheriff and affidavit of the claimant required by Laws 1855, Wag.St. p. 742, § 26, the taking of an indemnity bond from the plaintiff to the officer levying the execution does not release either of them from liability to a replevin suit by the owner of the property.

Belkin v. Hill, 53 Mo. 492.

Mo. 1932. Where mere determination of right of property seized under execution does not afford full relief, claimant should resort to common-law remedy, not to statutory proceeding, since latter neither aids nor supplants common-law remedy. Rev.St.1929, §§ 1184, 1185, V.A.M.S. §§ 513.130, 513.135.

State ex rel. American Asphalt Roof Corporation v. Trimble, 44 S.W.2d 1103, 329 Mo. 495.

⇐189. —— Jurisdiction.

Mo.App. 1897. Where property levied on under execution is claimed by a mortgagee, and the parties elect to proceed under

For references to other topics, see Descriptive-Word Index

Rev.St. § 4928, V.A.M.S. § 513.135, the subject-matter of the controversy being within the jurisdiction of the court, they cannot afterwards be heard to question such jurisdiction.

Williamson v. Bank of Curryville, 69 Mo.App. 368.

⇐190. —— Parties.

Mo. 1867. Under Act March 3, 1855, as amended by Act March 14, 1859, providing that any person who has any interest in the property on which a writ of execution or attachment has been levied may file his claim with the sheriff and sue on the bond taken to secure the delivery of such property, where property on which there was a deed of trust was levied on and a delivery bond executed, the beneficiary in the deed of trust may file his claim and sue on the delivery bond, where the trustee had refused to do so on request.

State, to Use of Hafkemeyer, v. McKellop, 40 Mo. 184.

⇐191. —— Process or notice, and appearance.

For cases from other jurisdictions, see other Key Number Digests.

⇐192. —— Pleading; withdrawal of claim.

Mo.App. 1890. Rev.St.1879, § 2367, provides that, where property levied on is claimed by a third party, the execution creditor shall answer or demur to the claim returned by the officer on or before the second day of the term, and the claimant may reply to the answer within such time as may be directed by the court, and all proceedings in relation to the claim shall be governed, as far as practicable, by the law relating to pleadings and contracts in civil actions. *Held*, that this statute contemplates that there shall be written pleadings in proceedings under the section.

Martin v. Fox, 40 Mo.App. 664.

An execution in favor of plaintiff was levied on certain mules as the property of defendant, they being at the time in the hands of F., who filed an affidavit claiming the mules as his property, in compliance with Rev.St.1879, § 2366. Plaintiff then gave an indemnifying bond, and filed, under section 2367, an answer denying that F. was in good faith the lawful owner of the property seized. *Held*, that such answer did not raise an issue that the mules had been transferred for the purpose of hindering or defrauding the creditors of defendant.

Martin v. Fox, 40 Mo.App. 664.

⇐193. —— Issues and questions considered.

For cases from other jurisdictions, see other Key Number Digests.

⇐194. —— Evidence.

⇐194(1). Presumptions and burden of proof.

Mo.App. 1935. Claimant of property levied upon as personal property of another by judgment creditor of such other has burden to prove ownership of such property, since he asserted affirmative of issue, and burden of proof always remains where it is placed by pleadings in first instance. Mo.St. Ann. §§ 1184, 1185, pp. 1436, 1439, V.A.M.S. §§ 513.130, 513.135.

Schell v. F. E. Ransom Coal & Grain Co., 79 S.W.2d 543.

⇐194(2). Admissibility.

Mo.App. 1898. Property taken under execution was claimed by an executor as belonging to his decedent, instead of the execution defendant. It appeared that the execution defendant was at one time employed as decedent's agent for the management of his farm, but that he had at other times occupied the farm in several ways. *Held*, that evidence that at a certain time when witness executed a quitclaim deed to the farm to decedent, the latter stated that he intended to keep the execution defendant there in the same manner in which he had operated it, was properly excluded, as too vague and uncertain.

Bagnell v. Chemical Bank of Sweet Springs, 76 Mo.App. 121.

Mo.App. 1901. In a proceeding under Rev.St.1889, §§ 4927, 4928, V.A.M.S. §§ 513.130, 513.135, to determine whether or not a claimant is the owner of a certain number of head of cattle, which had been levied upon as the property of her husband under an execution, it appeared that claimant was the owner of 11 head of cows and resided with her husband on the farm, the title to a part of which was in her and a part in the husband until 1897, when the husband concluded to quit farming and engage in merchandising; that he rented the farm to one B. for three years, and also entered into a partnership with him to engage in farming and stock raising; that the husband sold one-half of claimant's interest in her cattle to B. and turned the possession of the same over to him; that under the partnership agreement B. was to take the farm, care for the cattle and hogs, and all the proceeds were to be divided equally. It also appeared that during the years 1897 and 1898 the partnership sold some of the cattle, and that one-

half of the proceeds arising therefrom was either paid directly to claimant or to her husband and by him paid to her. In 1898 claimant's husband failed in his mercantile business, and at about the same time a settlement was had between the husband and B., and an adjustment of the partnership accounts between the partners and a division of the cattle was made, and a written lease of the farm was then drawn up, which claimant joined in executing. In the book of account kept between each member in the partnership, claimant's husband wrote and claimant signed the following: "I hereby ratify the accounts in this book on pages 234, 235, 236, 237, 240, and 241 between J. B. D. and J. M. B., and D. and B., as far as any of my property may be concerned, up to this date." In the account of D. and B. with J. B. D. appeared a credit entry of 11 head of cattle, $228.62, which was the value of the cattle as agreed between the partners when the same was turned over to J. M. B. In the settlement between the partners J. M. B. gave his note to claimant for the one-half interest in the cattle, which the claimant's husband had sold him when the partnership was formed. Claimant was permitted, over the objection of plaintiff, to testify to the facts and circumstances surrounding the signing of the writing by her, for the purpose of showing what was her intention in doing so. *Held*, that plaintiff's offer of entries made in the book containing the partnership accounts kept by claimant's husband, after the date of the writing therein signed by her, was properly refused.

Newberry v. Durand, 87 Mo.App. 290.

Mo.App. 1948. Where personal property rather than land was levied upon, on trial of third party claim, note and chattel mortgage securing it, which were given in connection with purchase of land in name of third party claimant, were properly excluded as not relevant to issue of ownership of personal property levied upon and as tending to confuse jury.

Koeppel v. Koeppel, 208 S.W.2d 929.

⇐194(3). Weight and sufficiency.

Mo.App. 1924. In replevin for automobiles, wherein the sheriff filed an interplea claiming the automobiles under an alleged levy and seizure under execution, evidence *held* to warrant finding that there was no levy on the automobiles. Per Bland, J.

First Nat. Bank v. Polk, 263 S.W. 504.

Mo.App. 1926. Evidence *held* to show that execution debtor was not owner of hogs sold under execution and that claimants were.

Long v. Robinson, 281 S.W. 78, 222 Mo. App. 503.

Mo.App. 1930. Evidence *held* to support finding tomatoes levied on were defendant's and not interpleader's.

Hull v. Whittenburg Canning Co., 30 S. W.2d 643.

⇐195. —— Conduct of trial or hearing.

Mo. 1843. Where the claimant of property levied on under Rev.St.1835, p. 367, art. 7, §§ 14, 15, 16, withdraws his claim before the trial of the right of property, the constable is not warranted in proceeding any further with the trial.

Brown v. Burrus, 8 Mo. 26.

Mo.App. 1903. A judgment was recovered against a husband, and an execution thereon levied on his interest in a stock of goods. His wife claimed the goods, secured possession of them on giving a forthcoming bond, and filed an interplea in the controversy, which was stricken out on motion of the judgment creditor. Subsequently the husband's trustee in bankruptcy was substituted as plaintiff in the execution in place of the judgment creditor, and filed an amended complaint praying that the husband be adjudged the owner of the property; that it be ordered given up by the wife; and that, in lieu thereof, plaintiff have judgment on the forthcoming bond for its value. *Held* that, as an adjudication in favor of plaintiff in the execution proceedings was indispensable to his right to proceed on the bond, a trial of the rights to the property could only be had after a reinstatement of the wife's interplea, or the filing by her of an amended one.

Pepperdine v. Hymes, 72 S.W. 1078, 99 Mo.App. 200.

⇐196. —— Questions for jury.

Mo.App. 1901. In a proceeding under Rev.St.1889, §§ 4027, 4028, V.A.M.S. §§ 513.130, 513.135, to determine whether or not a claimant is the owner of a certain number of head of cattle, which had been levied upon as the property of her husband under an execution, it appeared that claimant was the owner of 11 head of cows and resided with her husband on the farm, the title to a part of which was in her and a part in the husband until 1897, when the husband concluded to quit farming and engage in merchandising; that he rented the farm to one B. for three years, and also entered into a partnership with him to engage in farming and stock raising; that the husband sold one-half of claimant's interest in her cattle to B. and turned the possession of the same over to him; that under the partnership agreement B. was to take the farm, care for the cattle and hogs, and all the proceeds

For references to other topics, see Descriptive-Word Index

were to be divided equally. It also appeared that during the years 1897 and 1898 the partnership sold some of the cattle, and that one-half of the proceeds arising therefrom was either paid directly to claimant or to her husband and by him paid to her. In 1898 claimant's husband failed in his mercantile business, and at about the same time a settlement was had between the husband and B., and an adjustment of the partnership accounts between the partners and a division of the cattle was made, and a written lease of the farm was then drawn up, which claimant joined in executing. In the book of account kept between each member in the partnership, claimant's husband wrote and claimant signed the following: "I hereby ratify the accounts in this book on pages 234, 235, 236, 237, 240, and 241 between J. B. D. and J. M. B., and D. and B., as far as any of my property may be concerned, up to this date." In the account of D. and B. with J. B. D. appeared a credit entry of 11 head of cattle, $228.62, which was the value of the cattle as agreed between the partners when the same was turned over to J. M. B. In the settlement between the partners J. M. B. gave his note to claimant for the one-half interest in the cattle which the claimant's husband had sold him when the partnership was formed. Claimant was permitted, over the objection of plaintiff, to testify to the facts and circumstances surrounding the signing of the writing by her, for the purpose of showing what was her intention in doing so. *Held*, that where the record disclosed no admission on the part of the claimant, nor any uncontroverted evidence that claimant's husband was her agent for the sale of her cattle, the question whether there was such an agency was a question of fact for the jury.

Newberry v. Durand, 87 Mo.App. 290.

Mo.App. 1935. Claimant of property levied on as personal property of another by judgment creditor of such other *held* not entitled to peremptory instruction under evidence showing that he claimed to have taken property under chattel mortgage. Mo.St. Ann. §§ 1184, 1185, pp. 1436, 1439, V.A.M.S. §§ 513.130, 513.135.

Schell v. F. E. Ransom Coal & Grain Co., 79 S.W.2d 543.

⇐197. —— Instructions.

Mo.App. 1876. On the issue of ownership of property taken under execution, a charge that it was for the jury to determine whether the sale of the property was accompanied by a delivery within a reasonable time, followed by actual and continued change of possession, in determining which facts they should take into consideration the situation of the property, was in compliance with Wag. St. p. 281, § 10, and was not erroneous.

State, to Use of Gannett, v. Johnson, 1 Mo.App. 219.

Mo.App. 1901. In a proceeding under Rev.St.1889, §§ 4927, 4928, V.A.M.S. §§ 513.130, 513.135, to determine whether or not a claimant is the owner of a certain number of head of cattle which had been levied on as the property of her husband under an execution, it appeared that claimant was the owner of 11 head of cows and resided with her husband on the farm, the title to a part of which was in her and a part in the husband until 1897, when the husband concluded to quit farming and engage in merchandising; that he rented the farm to one B. for three years and also entered into a partnership with him to engage in farming and stock raising; that the husband sold one-half of claimant's interest in her cattle to B. and turned the possession of the same over to him; that under the partnership agreement B. was to take the farm, care for the cattle and hogs, and all the proceeds were to be divided equally. It also appeared that during the years 1897 and 1898 the partnership sold some of the cattle, and that one-half of the proceeds arising therefrom was either paid directly to claimant or to her husband and by him paid to her. In 1898 claimant's husband failed in his mercantile business, and at about the same time a settlement was had between the husband and B., and an adjustment of the partnership accounts between the partners, and a division of the cattle was made, and a written lease of the farm was then drawn up, which claimant joined in executing. In the book of account kept between each member in the partnership, claimant's husband wrote and claimant signed the following: "I hereby ratify the accounts in this book on pages 234, 235, 236, 237, 240, and 241, between J. B. D. and J. M. B., and D. and B., as far as any of my property may be concerned, up to this date." In the account of D. and B. with J. B. D. appeared a credit entry of 11 head of cattle, $228.62, which was the value of the cattle as agreed between the partners when the same was turned over to J. M. B. In the settlement between the partners J. M. B. gave his note to claimant for the one-half interest in the cattle which the claimant's husband had sold him when the partnership was formed. Claimant was permitted, over the objection of plaintiff, to testify to the facts and circumstances surrounding the signing of the writing by her, for the purpose of showing what her intention was in doing so. *Held*, that an objection that an instruction which left it to the jury to deter-

mine whether or not claimant's husband was her agent in handling her cattle, and whether or not, as her agent, he sold her cattle to the partnership, and whether or not she ratified such sale, was erroneous, for the reason that claimant testified that her husband was her agent, and for the further reason that the conflict in the evidence in respect thereto was untenable.

Newberry v. Durand, 87 Mo.App. 290.

Held, further, that such instruction could not be objected to on the ground that the hypothesis contained therein was not founded on any substantial evidence, direct or inferential.

Newberry v. Durand, 87 Mo.App. 290.

Held, further, that an instruction which left it to the jury to ascertain whether claimant by said writing meant to ratify a sale by her husband to the partnership of all her cattle, or to only one-half interest therein to J. M. B., was proper.

Newberry v. Durand, 87 Mo.App. 290.

Held, further, that an instruction which told the jury that, if it found from all the facts or circumstances that said writing was signed by claimant for the purpose of ratifying an absolute sale of all her cattle turned over to the partnership, then plaintiff should recover, unless it was further found that the cattle levied on were a part of those formerly belonging to said partnership, but that if it further found that said writing was intended only to ratify the sale of one-half interest to J. M. B., and not otherwise, then said writing did not confer absolute title in said partnership, and under the evidence and another instruction that the claimant ought to recover, was proper.

Newberry v. Durand, 87 Mo.App. 290.

⇐198. —— Verdict and findings.

Mo. 1853. Under Act Concerning Justice Courts, art. 7, § 14, providing that, if the jury find the goods and chattels levied on by a constable to be the property of the execution defendant, their verdict against a claimant of the goods shall justify the officer in selling them, where property was seized by a constable under execution, to which a third party interposed a claim, a verdict of the constable's jury that the property belonged to the plaintiff in execution justified the constable in selling the property.

Schroeder v. Clark, 18 Mo. 184.

Mo.App. 1935. In proceeding instituted by one claiming property levied on as personal property of another by judgment creditor of such other, verdict that jury found that claimant was not in possession under chattel mortgage of personal property levied on under execution mentioned in evidence *held* based upon issue as both parties accepted in presentation of case.

Schell v. F. E. Ransom Coal & Grain Co., 79 S.W.2d 543.

⇐199-200.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐201. —— Judgment and enforcement thereof.

Mo.App. 1886. In a proceeding under Rev.St.1879, §§ 2366, 2367, relating to the trial of the right of one claiming property levied on under an execution as the property of the execution debtor, a trial of the rights of property levied on under an execution is a judicial proceeding, and a judgment therein is as conclusive as a judgment in any other judicial proceeding.

Stevens v. Springer, 23 Mo.App. 375.

Mo.App. 1897. Where property seized on execution issued from a federal court is claimed by a third person, as provided by Rev.St.1889, § 4027, V.A.M.S. § 513.130, and the plaintiff in execution gives the marshal an indemnifying bond, and the officer returns such claim and bond to the clerk of such court, as required by section 4028, § 513.135, the court thereby acquires jurisdiction under the statute, though no forthcoming bond is given by the claimant to the officer as provided by the statute; and if plaintiff answers the claim, and claimant fails to prosecute his claim, a trial may be had of the title to the property, and a judgment against the claimant on such trial is conclusive on the parties, and is a bar to a subsequent action by such claimant against the execution purchaser.

McGregor v. Hampton, 70 Mo.App. 98.

Mo.App. 1933. Money judgment for third party claimant against sheriff, judgment creditor and surety on indemnifying bond for unlawful levy, *held* unauthorized, notwithstanding stipulation for court trial. Rev.St.1929, §§ 1184, 1185, V.A.M.S. §§ 513.130, 513.135.

American Asphalt Roof Corporation v. Marler, 56 S.W.2d 844.

Court *held* without jurisdiction except to render judgment of dismissal in claim proceeding to recover mortgaged property levied on under execution, where sheriff had surrendered possession thereof to holder of mortgage. Rev.St.1929, §§ 1184, 1185, V.A.M.S. §§ 513.130, 513.135.

American Asphalt Roof Corporation v. Marler, 56 S.W.2d 844.

For references to other topics, see Descriptive-Word Index

⇐202. —— Appeal.

Mo.App. 1876. The sufficiency of a notice of claim served on the officer levying an execution cannot be passed upon on appeal, where the notice is not preserved in the bill of exceptions.

State, to Use of Gannett, v. Johnson, 1 Mo.App. 219.

⇐203. —— Costs.

Mo. 1849. A sheriff, in a case of the trial of the right to property before him, in which claimant recovered but a small portion of the property, much less than half, may tax claimant with full costs.

Taylor v. Forman, 12 Mo. 547.

⇐204. Operation and effect of determination.

Mo. 1844. In case of a trial of the right of property, the verdict of the jury is a protection of the officer against all the parties; and the plaintiff in execution cannot compel him to proceed and sell the property levied on by tendering to him a sufficient bond of indemnity.

Fisher v. Gordon, 8 Mo. 386.

Mo. 1855. Though the statute permits a delivery bond to be given for property seized under execution, yet it does not intend to take away a trial of the right to the property seized, interposed by a claimant; and it follows, as a consequence, that the plaintiff in the execution may compel the officer by an indemnity bond to sell, notwithstanding a verdict in favor of the claimant.

Waterman v. Frank, 21 Mo. 108.

⇐205. Relevy on property.

For cases from other jurisdictions, see other Key Number Digests.

⇐206. Liabilities on bonds and undertakings.

⇐207. —— Claimants and their sureties.

Mo. 1878. An execution creditor levied on certain zinc and the claimant gave a delivery bond. The creditor demanded a sale and gave the sheriff an indemnifying bond. The claimant delivered a similar quantity of zinc to the sheriff as was levied on, and this was sold and the proceeds given to the creditor. *Held*, in an action on the indemnifying bond, that the creditor was estopped from asserting that the zinc sold was not the zinc levied on.

Anthony, to Use of Deggendorf, v. Bartholow, 69 Mo. 186.

Mo.App. 1892. Rev.St.1889, § 6311, V.A.M.S. § 513.130 note, provides that if the constable levy an execution, and one other than defendant claims the property and delivers the written notice of claim, the constable, before selling the property, shall take of the plaintiff a bond of indemnity. *Held*, that where a constable levied on property as belonging to defendant in the execution, when another claimed the property, and the claim as set out in the petition was informal, in that it omitted some material matters, a contention that the constable had no right to take the bond, and that, having taken it, the makers thereof were not liable, was without merit.

Smith v. White, 48 Mo.App. 404.

Rev.St.1889, § 6311, V.A.M.S. § 513.130 note, provides that if the constable levy an execution, and one other than defendant claims the property and delivers the written notice of claim, the constable, before selling the property, shall take of the plaintiff a bond of indemnity. *Held*, that where the interests of two persons in the property levied on was separate, one owning one part of the property and the other the remainder, they each had a separate action on the bond, notwithstanding that it was executed to the constable for the benefit of both.

Smith v. White, 48 Mo.App. 404.

Mo.App. 1894. Where a constable had levied an execution on mortgaged goods as absolutely the property of the mortgagor, and on a claim by the mortgagee a bond was given to indemnify the mortgagee against the sale of the goods, a sale by the constable was a breach of the bond; it being a sale of the property absolutely, and not of the mortgagor's interest.

State ex rel. Pape Bros. Moulding Co. v. Althaus, 60 Mo.App. 122.

⇐208. —— Indemnitors of officer.

See Sheriffs and Constables, ⇐126–151.

⇐209. —— Enforcement in proceedings for trial of right of property.

For cases from other jurisdictions, see other Key Number Digests.

⇐210. —— Actions.

Mo. 1855. Where property was seized under an execution, and parties other than the debtor claimed the property and executed a delivery bond to the sheriff, which they afterwards forfeited, it was *held* that they should not be allowed to show, in mitigation of damages, that the property really belonged to them.

Waterman v. Frank, 21 Mo. 108.

Mo.App. 1881. Where a person other than defendant in the execution claims the

For later cases see same Topic and Key Number in Pocket Parts

property levied on, and thereupon plaintiff in the execution executes an indemnity bond to the sheriff, there are two remedies open to the claimant, namely, an action on the bond, or an action of trespass against the principal and sureties therein, and it cannot be objected in an action on the bond that claimant did not resort to the other remedy.

State, to Use of Little, v. Donnelly, 9 Mo.App. 519.

Mo.App. 1894. Where a mortgage provided that, on failure of the mortgagor to pay one of the notes secured, the mortgagee might declare the others due and payable, an action brought after the maturity of the first note on a bond given the mortgagee by an execution creditor against a sale of the property mortgaged under execution was not premature.

State ex rel. Pape Bros. Moulding Co. v. Althaus, 60 Mo.App. 122.

Mo.App. 1916. Buyer of automobile, who paid only $190, *held* entitled to recover, in constable's action brought at his relation to recover penalty in indemnity bond executed by judgment creditors of seller levying on car, value of automobile at time of levy, with interest, not to exceed amount of bond.

Mead v. Blurton, 189 S.W. 637.

⇐211. Frivolous or vexatious claims.

For cases from other jurisdictions, see other Key Number Digests.

VII. SALE.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

⇐213. Nature and requisites in general.

Mo. 1847. Sales on executions issued from a federal court are to be governed by the law of the state in which they are made.

Evans v. Labaddie, 10 Mo. 425.

Mo.App. 1879. A sheriff's sale of the roadbed, rails, and right of way of a railroad is invalid, where the statutory requisites for the sale of real estate on execution are not observed.

Hart v. Benton-Bellefontaine Ry. Co., 7 Mo.App. 446.

⇐214. Statutory provisions.

For cases from other jurisdictions, see other Key Number Digests.

⇐215. Authority to sell.

⇐216. —— In general.

Mo.App. 1883. A special execution ordering a sale of attached property is not invalid for the reason that there is not a specific order for the sale of each article attached.

Meincke v. Bracksieck, 14 Mo.App. 315.

⇐217. —— Venditioni exponas.

Mo. 1887. A writ of venditioni exponas is not a writ of authorization, but may be called a branch of the writ of fieri facias, commanding the officer to execute that writ, and gives the officer no authority not previously possessed by him.

Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

Mo. 1912. A writ of venditioni exponas is one sometimes issued to cause a sale of lands seized under a former writ.

Howell v. Sherwood, 147 S.W. 810.

Mo.App. 1902. The function of a writ of venditioni exponas being merely to command the officer to whom it is issued to sell goods or property previously levied on under a former writ, and remaining in his hands after the return of the former writ, where the levy of an execution is void, a sale of the property under a writ of venditioni exponas passes no title to the buyer.

Caffery v. Choctaw Coal & Mining Co., 68 S.W. 1049, 95 Mo.App. 174.

⇐218. Powers of officer in making sale.

Mo. 1898. A sheriff selling property under execution is bound to protect the interests of both parties and, to avoid a sacrifice, may return the execution, "No sale for want of bidders."

Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

Mo. 1917. In making sale of property to satisfy judgment sheriff acted as judgment debtor's agent, as well as agent of judgment creditor, and it was his duty to act so as to protect interests of both.

Hoevel v. Hoevel, 199 S.W. 402.

Mo.App. 1949. Under statute providing that all real estate whereof the defendant or any person for his use was seized, in law or equity, at time of issue and levy of attachment, should be liable to be seized and sold upon execution, sheriff's sale of execution debtor's interest in realty standing in name of another was authorized although sheriff did not know facts about such interest. Mo.R.S.A. § 1336, subd. 5, V.A.M.S. § 513.090.

Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

⇐219. Mode of sale.

Mo. 1852. It is no objection to a sale of land on execution by a marshal of the United States, made prior to Act. Cong. May

For references to other topics, see Descriptive-Word Index

19, 1828, adopting the practice of the state courts, that it did not conform to the law of the state in which it was made.

Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219.

⇐220. Place of sale.

Mo. 1870. Under 1 Wag.St. p. 609, § 42, providing that real estate taken in execution by an officer shall be exposed to sale at the court-house door, on some day during the term of the circuit court of the county where the same is situated, where a judgment is obtained in a common pleas court, and a sale thereunder is made at the court-house door of the circuit court at another town, which is the county seat, such sale is valid.

Mers v. Bell, 45 Mo. 333.

Mo. 1874. Under 1 Wag.St. p. 609, § 42, providing that a sale of real estate under execution shall be made at the door of the court house where the circuit court is held, where the circuit court house was occupied by United States troops, and a neighboring church in the same county seat was used as a court house, a sale of the real estate under execution at the door of such church was valid.

Kane v. McCown, 55 Mo. 181.

Mo. 1876. On February 15, 1864, an act was passed, to take effect on its passage, providing that the "seat of justice of the county of P. is hereby removed from G. to S.," and further providing that the public records, etc., should be removed to the new county seat as soon as practicable after the passage of the act, and that all courts should thereafter be held at the new county seat, "provided, however, that the county court shall not be required to hold their sessions at the new county seat until suitable buildings are erected." An execution sale was made at the old courthouse in G. on May 6, 1894, during a term of the court there, before suitable buildings were erected at the new seat and the records removed there. *Held*, that the sale was valid.

Bouldin v. Ewart, 63 Mo. 330.

Mo. 1876. An execution sale of land by a United States marshal at the door of the courthouse where the District Court of which he was an officer was held, during a session of the court, was valid, though the land was situate in another county.

Baker v. Underwood, 63 Mo. 384.

⇐221. Time of sale.

C.C.Mo. 1874. In Missouri, the power to sell continues after the return day of the execution as to land duly levied upon. Gen. St.Mo.1865, p. 646.

Webster v. Woolbridge, Fed.Cas.No.17,340, 3 Dill. 74.

Mo. 1853. A sale of real estate under an execution issued and levied in the lifetime of the defendant, which did not take place till after defendant's death, is not void, but at most only voidable.

Mundy's Adm'r v. Bryan, 18 Mo. 29.

Mo. 1860. Where, on account of the nonattendance of a circuit court judge, the term lapses after the statutory adjournment from day to day for three days, a sheriff's sale of real estate, made during the three days, should be set aside.

Sarpy v. Detchemendy, 31 Mo. 196.

Mo. 1865. The indorsement of a sheriff on an execution that he has levied it on real estate does not continue it in force, so as to authorize a sale of such real estate after the time at which the execution is made returnable.

Lackey v. Lubke, 36 Mo. 115.

Mo. 1872. Where a sale under execution was made at the first term of court that it could be made after the levy, it was not invalid because the levy had been made a year prior to the sale and by the sheriff's predecessor in office.

Boyd v. Jones, 49 Mo. 202.

An execution sale made during a term of the county court, and not during a term of the circuit court, is absolutely void.

Mo. 1873. Merchants' Bank v. Evans, 51 Mo. 335.

Mo. 1874. Bruce v. Leary, 55 Mo. 431.

Mo. 1874. A sale of land under a venditioni exponas on an execution which might have expired is void.

Wack v. Stevenson, 54 Mo. 481.

Mo. 1874. Under Sess.Acts 1863, p. 20, a sale under an execution theretofore levied may be made after the return day thereof.

Kane v. McCown, 55 Mo. 181.

Mo. 1878. The general law respecting execution sales requires them to be made at the courthouse door on some day during the term of the circuit court of the county. 1 Wag.St. p. 609, § 42. The act creating the probate court of Linn county, Laws 1853, p. 392, by its sixth section provided that all sales and executions should be governed and conducted in like manner as sales in the circuit court. *Held* not to warrant a sale otherwise than as presented by the general law, and a sale during the session of the Linn probate court was a nullity.

Lynde v. Williams, 68 Mo. 360.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1885. Where a sheriff's deed is based on judgments which recite a notice, but not a citation, as provided by Rev.St. 1855, p. 1425, § 29, and the notice appears to be that contemplated in section 24, which is no citation for judgment at all, and the sale does not appear to have been made during the term of the circuit court, the deed is void.

Roberts v. Nelson, 86 Mo. 21.

Mo. 1887. Where a general execution has been levied by the sheriff on property anterior to the return day, the property so levied on may be sold at any time after the return day, providing it is sold during the term.

Karnes v. Alexander, 4 S.W. 518, 92 Mo. 660.

Mo. 1887. A writ of fieri facias can be lawfully executed by a sale of the premises before the end of the next term after the return term; and, if for any cause the sale was not made at the return term, then the officer had the same power to sell the property levied on after the return term of the writ, and before the end of the next term, as he had to sell at the return term, and until the end of the second term the lien of the judgment, the life of the execution, and the power to sell were preserved by the levy.

Huff v. Morton, 7 S.W. 283, 94 Mo. 405.

Mo. 1898. If a sheriff levies an execution before the return term, he may proceed and sell at any time during the term.

City of Aurora ex rel. Williams v. Lindsay, 48 S.W. 642, 146 Mo. 509.

Under Rev.St.1909, § 2228, V.A.M.S. § 513.265, sale under special execution was not invalid because made at the second term of the court after its issuance.

Mo. 1919. Ammerman v. Linton, 214 S.W. 170, 279 Mo. 439.

Mo. 1919. Ammerman v. Linton, 214 S. W. 174.

Mo. 1933. Execution sale of land *held* not void because not made before end of second term of circuit court from which execution was issued and sent to sheriff of another county, and lien of judgment attached at time of levy. Mo.St.Ann. § 1155; Rev.St.1929, § 1200, V.A.M.S. §§ 513.030, 513.270.

Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1008.

⇐222. Notice of sale.

⇐222 (1). In general.

Mo. 1848. Sales under execution will not be set aside because the property was advertised for sale on two different days, by different sets of advertisements; it appearing that such second advertisement was induced by an additional levy, and it also appearing that no injury resulted from the sale under such circumstances.

McDonald v. Cook, 11 Mo. 632.

Mo. 1864. A sheriff, having an execution against A., B., and C., levied the same upon the lands of B. and C., and in his advertisement of sale stated that by virtue of an execution against A. and others he had levied upon the lands, describing the time and place of sale and the property to be sold. *Held* that, as the real estate appeared to be situated in the county in which the defendants resided, they were not entitled to notice of the execution.

Harrison v. Cachelin, 35 Mo. 79.

Mo. 1886. Under the statute requiring a sheriff to give notice of an execution sale by advertisement in a daily or weekly newspaper, a recital in his deed to a purchaser that notice was given "by advertisement in the Gazette-Tribune, a newspaper published in my said county," creates the presumption, nothing appearing to the contrary, that the paper was a daily or weekly one.

Chandler v. Bailey, 1 S.W. 745, 89 Mo. 641.

Mo. 1896. Under Rev.St.1889, § 4943, V. A.M.S. § 513.225, requiring notice in writing to a defendant in an execution of "all execution sales," where a judgment is rendered in a county where defendant resides on personal service of notice, and an execution is issued to, and levied on defendant's land in, another county, he is entitled to notice of sale.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

Mo. 1910. Gen.St.1865, c. 160, § 43, providing that, when real estate situated in a different county from that in which the execution defendant resides is sought to be sold under execution, plaintiff must give notice to defendant residing in the state, does not entitle a nonresident to notice, and does not require notice on his attorney in fact, residing in the state and in a different county from that where the land sought to be sold is situated.

Norman v. Eastburn, 130 S.W. 276, 230 Mo. 168.

Mo.App. 1941. The city of St. Louis is treated as a county within statute providing for notice to be given of time and place of execution sale. Rev.St.1939, § 1362, V.A.M.S. § 513.205.

City of St. Louis v. Koch, 156 S.W.2d 1.

For references to other topics, see Descriptive-Word Index

⇐222 (2). Requisites and sufficiency in general.

Mo. 1860. It will not invalidate a levy on real estate that the name of the county in which the land is situated is not stated in the advertisement of sale.

Duncan v. Matney, 29 Mo. 368, 77 Am. Dec. 575.

Mo. 1864. Under the provision of the statute that, upon a sale of land upon execution, notice shall be given "of the time and place of sale, and what real estate is to be sold and where situated, by advertisement," where a sheriff levied upon lands of B. and C. under an execution against A., B., and C., and the advertisement was of a sale by virtue of an execution against A. and others, it was *held* that the advertisement complied with the requirements of the statute, and that the sale and sheriff's deed passed the title of B. and C.

Harrison v. Cachelin, 35 Mo. 79.

Mo. 1881. Wag.St. p. 609, § 42, required a sheriff, charged with the duty of selling real estate under execution, to publish the notice of sale in a newspaper, if one be published in the county where the sale was to take place, and only allowed resort to be made to publications of notice by handbills where there was no newspaper published in the county. *Held*, that where the sole proprietor and publisher of the paper published in the county was defendant in an execution, and refused to publish the notice after the proper charges had been tendered him, resort was properly had to notice by handbills.

Walton v. Harris, 73 Mo. 489.

Mo. 1900. Where a judgment creditor, after causing notice of a sheriff's sale of land to be published for a portion of the statutory time, amended the same by adding a description of other real estate, but did not change the date of sale, the fact that sufficient notice had not been given as to the land last inserted in the notice did not affect the validity of the notice as to the balance of the land.

Bradley v. Heffernan, 57 S.W. 763, 156 Mo. 653.

Mo.App. 1911. Rev.St.1909, § 2218, V.A.M.S. § 513.205, providing that, when real estate shall be taken in execution by an officer, it shall be his duty to expose the same for sale, after giving notice by advertisement in some newspaper printed in the county which may be designated by the plaintiff or his attorney of record, makes it the official duty of a sheriff taking real estate under execution to give the plaintiffs or their attorney a reasonable opportunity to exercise their right to designate the newspaper; and, if in the meantime the sheriff has given the notice of sale for publication to some other newspaper, it is his duty to give such notice to the paper designated by plaintiffs or their attorneys.

State ex rel. Black v. Wilson, 139 S.W. 705, 158 Mo.App. 105.

Mo.App. 1941. A purchaser of trust deed covering property, which assignee of judgment sought to have sold at execution sale, was not entitled to notice of execution sale under statute requiring service of written notice on owner of property residing in county other than that in which realty is situated, since purchaser was not the owner, but applicable statute was one providing for notice by advertisement in a newspaper. Rev.St.1939, §§ 1362, 1364, V.A.M.S. §§ 513.205, 513.225.

City of St. Louis v. Koch, 156 S.W.2d 1.

⇐222(3). Description of property.

Mo. 1843. Where a person owns several building lots laid out on a particular tract of land, the sheriff cannot sell his interest in those lots by an advertisement offering for sale the whole tract on which the town was laid off. Such description is too vague and uncertain.

Evans v. Ashley, 8 Mo. 177.

Mo. 1855. At a sheriff's sale the description was "the one undivided third part of the lots which were not sold by said L., in addition to the then city of St. Louis laid out by said L., S., and B., on the river," etc. It was proved that the addition was well known, and that only one lot had been sold before the death of L. *Held*, that the description was sufficient.

Lisa v. Lindell, 21 Mo. 127, 64 Am.Dec. 222.

Mo. 1872. The absolute owner of property has the right to transfer the same by any description which, together with parol evidence, may ascertain the property conveyed. This rule applies to transfers by the owner himself, and not to sales in invitum of his property, such as execution sales, where the officer must have such a description as will notify the bidders with certainty as to the property offered for sale, so as to prevent a sacrifice to the injury of the debtor or creditor.

State, to Use of Patrick, v. Keeler, 49 Mo. 548.

⇐223. Postponement.

Mo. 1847. An officer selling property under execution is the agent of both the plaintiff and the defendant, and is bound to protect the interests of both. He is not bound to accept a bid without reserve, but, if

he can see that a sacrifice of property will be prevented by a little delay, he may return "No sale for want of bidders."

Conway v. Nolte, 11 Mo. 74.

Mo. 1872. An officer selling land under execution is bound to protect the interests of all parties, and, if he can see that a sacrifice of property will be prevented by reasonable delay, he may return, "No sale, for want of bidders," and especially so on a resale, when the time and circumstances are such as to prevent reasonable competition.

Shaw v. Potter, 50 Mo. 281.

⇐224. Sale in parcels.

Mo. 1838. A sale of lands on execution is not invalid merely because several parcels are sold together.

Evans v. Wilder, 5 Mo. 313.

That a sheriff sold land in a lump, instead of parceling it out as directed by Rev. Code 1825, p. 367, § 13, so as to sell no more than is necessary to satisfy the judgment and costs, did not render the title of a subsequent grantee of the execution purchaser illegal, where there was no objection made at the time to such mode of sale.

Evans v. Wilder, 5 Mo. 313.

Mo. 1860. Rev.Code, 1845, p. 481, § 28, directing sheriffs to divide real estate levied on and sell only to satisfy the execution, is directory only, and does not invalidate a sale not made in accordance therewith.

Fine v. St. Louis Public Schools, 30 Mo. 166.

Mo. 1876. An execution sale of lands in mass, instead of in parcels, as provided by law, is not ipso facto void, but is subject to be set aside on motion, or by bill in equity, where injury has resulted therefrom to the judgment debtor.

Smith v. Charter Oak Life Ins. Co., 64 Mo. 330.

Mo. 1888. A lot worth $3,000 was sold for $51, on special execution for a street assessment, and costs amounting to $8.55. The lot had two houses on it, each fronting on different streets, and could have been divided into parcels each fronting on a street, or by a line running from street to street, and either part would have satisfied the execution. *Held*, that the deed would be set aside for failure of the sheriff to sell in parcels, though the officer did not know how the improvements were located.

Gordon v. Hickman, 9 S.W. 920, 96 Mo. 350.

Rev.St. § 2368, providing that, where an execution is levied on real estate, the sheriff shall divide the same, if susceptible of division, and sell so much as will be sufficient to satisfy the execution, is directory merely; and where he who seeks to sustain the method of sale pursued by the officer shows its justice and expediency, the sale will not be disturbed on the ground that there was no subdivision.

Mo.App. 1881. Sheehan v. Stackhouse, 10 Mo.App. 469.

Mo.App. 1881. Cornell v. Stackhouse, 10 Mo.App. 577.

⇐225. Order of offering for sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐226. Conduct of sale in general.

Mo. 1835. On execution for the sale of property attached on mesne process, the sheriff has no right to try the right of property, but must sell.

Mitchel v. Gregg, 4 Mo. 37.

Mo. 1876. A sale of personal property under execution, which is not present so that it may be inspected by the bidders and delivered to the purchaser, is not absolutely void, but is voidable only by the debtor in the execution, for cause shown to the court, in a motion to set aside the sale for that reason.

Eads v. Stephens, 63 Mo. 90.

Mo.App. 1932. On execution sale, sheriff may not sell to any one other than highest bidder, nor for anything other than ready money. Rev.St.1929, §§ 1202, 1203, V.A.M.S. §§ 513.235, 513.240.

Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo.App. 746.

Mo.App. 1943. Sheriff had duty to conduct execution sale in accordance with procedure outlined by applicable statutes. Mo.R.S.A. §§ 1366, 1367, 1371, 1386, V.A.M.S. §§ 513.150, 513.235, 513.240, 513.350.

State ex rel. and to Use of Dietrich v. Schade, 167 S.W.2d 135.

⇐227. Terms and conditions.

For cases from other jurisdictions, see other Key Number Digests.

⇐228. Persons who may purchase.

Mo. 1854. It is not fraud for a debtor to employ some one to buy in his property at a sheriff's sale, merely to prevent its sacrifice.

Lee v. Lee, 19 Mo. 420.

Mo. 1859. Where a person in whose favor another has confessed a judgment accepts a power of attorney constituting him an agent of the latter for the disposition of

certain lots of land, and thereafter has an execution issued on the judgment and levied on the lots, and becomes the purchaser at the sheriff's sale, the doctrine that a person standing in a fiduciary relation to another will not be permitted, in the management of the property, to derive an undue advantage at the expense of the cestui que trust, applies.

Jamison v. Glascock, 29 Mo. 191.

Mo. 1859. Where, under a judgment against several persons for a partnership debt, a levy is made upon partnership property or upon the private property of one partner, and one of the partners purchases the same at the execution sale, the sheriff's sale will not operate in equity a transfer of the title to the purchaser.

Evans v. Gibson, 29 Mo. 223, 77 Am.Dec. 565, affirmed 34 Mo. 202.

Mo. 1882. The fact that the attorney who conducted proceedings by an attachment on land was the purchaser at the execution sale furnished no ground for attacking the validity of the sale.

Bray v. Marshall, 75 Mo. 327.

Mo. 1906. The surviving husband and heirs of the deceased wife are not tenants in common in the wife's realty, and the heirs may purchase the husband's interest at a sale under an execution issuing on a judgment against him.

Martin v. Castle, 91 S.W. 930, 193 Mo. 183.

Mo.App. 1890. Under Rev.St.1889, § 4949, V.A.M.S. § 513.350, providing that no officer to whom any execution shall be directed shall purchase any goods, real estate, etc., or bid at any sale made by virtue of such execution, a sale on execution to six associate purchasers, one of whom was the sheriff, is invalid.

Shotwell v. Munroe, 42 Mo.App. 669.

Rev.St.1889, §§ 4949, 6309, V.A.M.S. § 513.350, relating to sales under an execution, and declaring that a sale to the sheriff shall be void, are merely declaratory of the common law, resting on principles of public policy, which prohibit any trustee from becoming directly or indirectly interested in a sale made by him.

Shotwell v. Munroe, 42 Mo.App. 669.

Mo.App. 1903. Where a wife with her own funds purchased her husband's land at execution sale, without collusion, she acquires a good title, in which her husband has no interest which can be subjected to the payment of his debts.

Bracken v. Milner, 73 S.W. 225, 99 Mo. App. 187.

⇐229. Bids.

⇐230. —— In general.

Mo. 1869. Defendants, who were sureties, at an execution sale have a right to agree among themselves that they will bid an amount for the principal defendant's property sufficient to save themselves harmless from liability; and, if they were guilty of no improper conduct or artifice calculated to deter bidders, the sale will stand, although it may have inured greatly to their benefit.

Stewart v. Severance, 43 Mo. 322, 97 Am.Dec. 392.

Mo. 1875. Judgment creditors may agree among themselves that one of their number shall at the execution sale bid for all and for an amount sufficient to indemnify themselves, and such a combination will not vitiate the sale, unless made for the purpose of depressing the bids.

Boyd v. Jones, 60 Mo. 454.

Mo. 1879. The smallness of the consideration paid by the purchaser at execution sale does not affect the validity of his title, if he was guilty of no fraud.

Boyer v. Tucker, 70 Mo. 457.

Mo. 1880. By mutual consent the bidder at execution sale may transfer his purchase to another, and such other become the recipient of the deed from the sheriff.

Massey v. Young, 73 Mo. 260.

Mo. 1921. In a suit under Rev.St.1909, § 7752, V.A.M.S. § 429.380, against contractor and owners, the sheriff selling the property was bound to protect the interest of all the parties, and was the agent of all, and if his advertisement attracted no bidder it was his business to take notice of that fact, and, if honesty and fairness required it, to return the execution, "No sale for want of bidders," rather than sell to the judgment creditor for a mere fraction of 1 per cent. of its worth.

Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

⇐231. —— Acceptance or rejection.

For cases from other jurisdictions, see other Key Number Digests.

⇐232. Payment of bid.

⇐233. —— In general.

Mo. 1872. It seems that the delivery of a sheriff's deed and the payment of the purchase money are concurrent acts, and the purchaser is not bound to part with his money until a deed for the premises is tendered.

Shaw v. Potter, 50 Mo. 281.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1932. On execution sale, until money is paid, bidder gets nothing. Rev.St. 1929, §§ 1202, 1203, V.A.M.S. §§ 513.235, 513.240.

Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo.App. 746.

Neither sheriff nor successful bidder at execution sale could determine how much of bid should be paid in. Rev.St.1929, §§ 1202, 1203, 8179, V.A.M.S. §§ 429.260, 513.235, 513.240.

Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo.App. 746.

⇐234-236.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐235. Failure to comply with bid.

⇐237. —— Resale.

Mo. 1847. Where, at a sale under execution, property was sold, and the purchaser had until 5 o'clock in the afternoon to pay the money, and the law required the sale to be before 5, it was *held* that the sheriff had no right to resell a few minutes before 5.

Conway v. Nolte, 11 Mo. 74.

Mo. 1847. Where a purchaser at a sheriff's sale refuses to pay for property struck off to him, the sheriff can sell again without notice.

Illingworth v. Miltenberger, 11 Mo. 80.

Mo. 1882. A sheriff is not authorized in making a resale under execution, under Rev. St.1879, § 2384, unless the purchaser positively refuses to pay the amount of his bid, and simple neglect is not enough.

Phillips v. Goldman, 75 Mo. 686.

Mo. 1883. Where property is sold and the purchaser refuses to pay the amount bid therefor, the officer, under the express provisions of 1 Wag.St. p. 610, § 46, is authorized to resell the same as if no previous sale had been had, and, if any loss is occasioned thereby, the officer shall recover the amount of such loss, with costs, by motion before any court or before any justice, if the same shall not exceed his jurisdiction.

State ex rel. Matney v. Spencer, 79 Mo. 314.

⇐238. —— Liabilities of bidders.

Mo. 1856. Section 42 of the law regulating executions, Rev.Code 1845, p. 483, authorizing a sheriff, upon the refusal of the purchaser to receive the property, to sell it to another, and to recover the loss by summary process, or by action against such recusant purchaser, does not reach the case of one who has bought of such purchaser his bid, or bargain, even when the substitution has been made with the sheriff's consent and returned accordingly.

Wimer v. Obear, 23 Mo. 242.

Mo. 1866. The provisions of the statute delating to executions, Rev.Code 1855, p. 747, §§ 49, 50, were intended to provide a summary and speedy process for the collection of the amount due on the execution, and to protect the creditor against loss; and hence, if land is sold the second time because the first purchaser refused to comply with his bid, and the proceeds of sale satisfied the execution, the sheriff cannot have judgment on motion against the first purchaser.

Reed v. Shepperd, 38 Mo. 403.

Mo. 1873. The defendant bought property at a sheriff's sale, but the next morning informed the sheriff that he bought the property as agent for another. The sheriff entered the name of the alleged principal on the sale book as purchaser, with a memorandum of the facts. *Held*, that the contract of sale and purchase was complete when the bid was accepted and entered on the sale book, and the defendant was liable for the purchase money.

Gray v. Case, 51 Mo. 403.

Mo. 1873. Where land offered for sale under an execution is bid off, but the money is not paid, and the land is resold under the same execution for a less sum, if the amount finally paid is sufficient to satisfy the judgment and costs, the defendant in execution will be entitled to maintain a suit in equity for the difference in the bids. So *held* where both sales were made to the same bidder.

Strawbridge v. Clark, 52 Mo. 21.

Mo.App. 1949. Where statutes provided that if bidder at execution sale refused to pay amount of his bid for property, officer making sale might again sell to the highest bidder as though no previous sale had occurred, and if loss was occasioned thereby, officer could recover amount on motion before court or justice in a summary way, bidder who claimed he did not obtain title on execution sale because property belonged to another, was not entitled to be relieved from his bid by reason of mutual mistake of fact or unfairness. Mo.R.S.A. §§ 1307, 1308, V.A.M.S. §§ 513.240, 513.245,

Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

⇐239. —— Actions on bids; summary proceedings.

Mo. 1846. In an action against a purchaser at a sheriff's sale, who refused to pay the amount bid, for the difference between

For references to other topics, see Descriptive-Word Index

his bid and the price obtained at a subsequent sale, the return of the sheriff is competent evidence.
Hensley v. Baker, 10 Mo. 157.

Mo. 1858. A sheriff can maintain an action in his own name against a purchaser at a sale for the price, though no note has been given for the purchase money.
Wiley v. Robert, 27 Mo. 388.

Mo.App. 1949. In action by sheriff to recover amount bid on execution sale, less amount received on resale, even if failure of consideration would relieve purchaser of liability on bid, failure of consideration was an affirmative defense and burden of proof was on purchaser to show it.
Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

In action by sheriff to recover amount bid by defendant at execution sale less amount realized at resale, evidence sustained determination rejecting defense of failure of consideration based on claim that execution debtor had no interest in property.
Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

⇐240. Entry and record of sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐241. Certificate of sale.

Mo. 1838. Where the certificate of a sheriff recited that lands sold by him on execution could be redeemed within 2½ years, instead of 3 years, as the statute provided, such mistake does not invalidate the instrument, since it produces no injury to any one.
Evans v. Wilder, 5 Mo. 313.

A sheriff's certificate of sale, made in the name of the sheriff, although signed by his deputy, is valid under St.1821.
Evans v. Wilder, 5 Mo. 313.

Mo. 1842. A certificate of the sale of lands on execution must be made in the name of the sheriff, although a deputy may execute it.
Evans v. Wilder, 7 Mo. 359.

Mo. 1843. A certificate of purchase of land at a sale on execution must be signed by the sheriff, or in his name, and a certificate in the name of a deputy is void under Act June 28, 1821.
Evans v. Ashley, 8 Mo. 177.

⇐242. Confirmation.

Mo. 1848. An execution sale will not be confirmed by a court of chancery where the execution creditor by his statements induced persons not to bid at the sale, and was thereby enabled to buy the property at a great sacrifice.
Rose v. Bates, 12 Mo. 30.

⇐243. Persons who may question validity of sale.

⇐244. —— In general.

Mo. 1842. Where the property of one of two defendants is sold on the execution, the other cannot object to the legality of the sale.
Hicks v. Perry, 7 Mo. 346.

⇐245. —— Waiver and estoppel.

Mo. 1869. Where a party is properly in court, and has knowledge of the process, and has suffered the sheriff to deed the property, and the rights of third parties have intervened, he is estopped from setting aside the execution sale on grounds not apparent on the record.
Downing v. Still, 43 Mo. 309.

Mo. 1876. Where a party, knowing that a judgment against him is void, silently stands by and sees his property bid off at execution sale, permits the buyer to pay for it, and demands and receives the surplus of the proceeds, he is estopped to aver anything contrary to the validity of the sale.
Austin v. Loring, 63 Mo. 19.

Mo. 1901. Plaintiff, conceding that his debtor's deed was fraudulent and void, levied his execution on the equity of redemption of his debtor, and caused same to be sold. *Held*, that he could not now impeach the title of the grantee on the ground that the price was inadequate.
Purse v. Estes, 65 S.W. 245, 165 Mo. 49.

Mo. 1921. Since one who takes and retains benefits which he has the right to accept or reject is afterwards estopped to take an inconsistent position, a judgment creditor, whose attorney caused execution to be levied and defendant's land sold and received and retained the sheriff's check for the net proceeds, is estopped to question the validity of the sale.
Clelland v. Clelland, 235 S.W. 816.

Mo. 1922. Where a wife, tenant by the entireties, caused levy of an execution in her favor on land subject to the tenancy and had it sold, she was not estopped to attack a sheriff's deed fraudulently caused to be made to another by her agent, who had agreed to have the deed made to her daughter.
Mahen v. Ruhr, 240 S.W. 164, 293 Mo. 500.

Mo. 1922. Where capital stock was sold under execution against one who had no in-

terest therein, and the true owner claimed the stock at the time of the sale, the giving to the sheriff of an indemnifying bond by the purchaser did not estop the owner from later claiming the stock.

Rookery Realty, Loan, Inv. & Bldg. Co. v. Johnson, 243 S.W. 123, 294 Mo. 461.

Mo. 1931. Judgment defendant, suing to set aside sheriff's sale of land four years after sale, *held* not estopped as against subsequent purchaser, where it was disputed that she waited any considerable time after knowing of sale.

Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

Mo.App. 1890. An execution debtor, consenting to a sale under an alias execution, urging a person to buy at the sale, and receiving the benefit of the sale, is estopped from questioning the validity of the sale.

Carter v. Shotwell, 42 Mo.App. 663.

Mo.App. 1890. One who was benefited by a second execution sale by reason of the fact that a note on which he was a surety was paid by the proceeds of the sale is not estopped from denying the validity of the sale, made on an alias execution, by showing that the judgment had been satisfied under the first execution.

Shotwell v. Munroe, 42 Mo.App. 669.

Mo.App. 1915. One claiming title to land under conveyances from a judgment debtor, and from a purchaser at execution sale, *held* estopped from assailing the validity of the execution sale.

In re Thirty-Ninth St., 176 S.W. 524, 88 Mo.App. 618.

Mo.App. 1931. Partners not served and not appearing, in action brought against partnership as corporation, *held* not estopped from suing in trover against purchaser at execution sale.

McGeorge v. Danforth, 39 S.W.2d 565.

Mo.App. 1943. Where judgment debtor and his attorney informed sheriff prior to execution sale that chattel mortgage on truck to be sold was no part of execution and had nothing to do with the sale, that the debtor attended the sale and bid thereat, did not "estop" the debtor from complaining of manner of sale and enforcing statutory penalty against the sheriff and sureties on his bond for failure to conduct the sale as required by law. Mo.R.S.A. § 1386, V.A.M.S. § 513.350.

State ex rel. and to Use of Dietrich v. Schade, 167 S.W.2d 135.

Judgment debtors were not required to refrain from bidding at execution sale merely because sheriff decided to disregard law and conduct sale in accordance with his own ideas of adjusting and selling various rights and obligations of the parties interested. Mo. R.S.A. §§ 1366, 1367, 1371, 1386, V.A.M.S. §§ 513.150, 513.235, 513.240, 513.350.

State ex rel. and to Use of Dietrich v. Schade, 167 S.W.2d 135.

⇐246. Opening or vacating.

Mo.App. 1942. Purchaser of automobile at execution sale was charged with knowledge that he was taking title subject to power of court to set aside proceeding for good cause shown at return term of the execution and title acquired was not absolute but only conditional.

State ex rel. Weber v. McLaughlin, 157 S.W.2d 800.

⇐247. —— Grounds in general.

Mo. 1863. An execution was issued and levied on real estate, but the property was not sold at the return term of the writ. At the second term after the return term, the real estate was sold by the officer and purchased by a junior judgment creditor. After the sale, plaintiff moved the court to set aside the sale and return the money paid to the purchaser, which motion was sustained. *Held*, that the court erred in so doing.

Shouse v. Bailey, 34 Mo. 151.

Mo. 1885. The court has complete control over its own process, and has the power to set aside an execution sale at or before the return term of the writ.

American Wine Co. v. Scholer, 85 Mo. 496, affirming 13 Mo.App. 345.

Mo. 1912. Cloud on title to land sold under execution does not authorize vacation of the sale, in the absence of fraud of the creditor.

Daugherty v. Gangloff, 144 S.W. 434, 239 Mo. 649.

Circumstances reviewed, and *held* that the circuit court did not err in refusing to set aside a sale on execution.

Mo.App. 1881. Sheehan v. Stackhouse, 10 Mo.App. 469.

Mo.App. 1881. Cornell v. Stackhouse, 10 Mo.App. 577.

Mo.App. 1909. Execution sales may be set aside on motion for about the same reason as judicial sales in the strict meaning of the words "may be."

State ex rel. Hartley v. Innes, 118 S.W. 1168, 137 Mo.App. 420.

Mo.App. 1949. As between sheriff holding sale under execution and bidder at such sale, rule of caveat emptor applies in the absence of any fraud on the part of the sheriff,

For references to other topics, see Descriptive-Word Index

and sale will not be set aside because of failure of consideration.

Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

⇐248. —— Defects or irregularities in execution or levy.

Mo. 1859. On the return day of the execution the court, on motion of defendant, may set aside the proceedings of the officer for irregularity on the part of the plaintiff in the execution in failing to give the notice of the issuing of the execution, required by Rev.Code 1855, p. 746, § 46, although the sheriff may have executed the deed to the purchaser.

Ray v. Stobbs, 28 Mo. 35.

Mo. 1896. Under Rev.St.1889, § 4943, V.A.M.S. § 513.225, providing that, where real estate owned by the execution defendant was situated in a different county from his residence, plaintiff, in order to levy on it, must serve notice in writing of such levy on the execution defendant, the failure to give the defendant notice in writing of a levy on his land situated in a county other than his residence was a mere irregularity, which did not render the sale void.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

Mo. 1909. An action to set aside a sheriff's sale is a direct attack on its validity, so that it may be vacated for irregularity in proceedings had prior thereto, including the premature return of the execution.

Rogers v. Wilson, 119 S.W. 369, 220 Mo. 213.

Mo. 1931. Failure to give written notice of issuance of execution warranted setting aside sale of land in county other than judgment defendant's residence. Rev.St.1919, § 1651, V.A.M.S. § 513.225.

Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

Mo.App. 1910. The advertisement of a lot sold at execution sale stated that it was a corner lot on G. street, and the deed tendered the purchaser conformed to the levy and advertisement but the lot was not in fact a corner lot. There was a point on a certain survey of the subdivision which was designated G. street, and it could have easily been determined by slight investigation whether the street was opened or dedicated, and the lot could have been located. The purchaser lived within five or six blocks of the lot, and was familiar with the neighborhood, and had passed the lot sold, but claimed that he relied upon the statement in the advertisement that it was a corner lot, and was misled thereby into bidding a higher price than it was worth as a noncorner lot. *Held*, that the purchaser could not rely on the misstatement in the advertisement and deed that the lot was a corner lot to avoid the sale or justify his refusal to accept the lot.

Clarke v. Cooper, 128 S.W. 47, 148 Mo. App. 230.

⇐249. —— Irregularities or misconduct affecting sale.

Mo. 1844. The provision in St.1825, § 13, concerning executions, "that in all cases where execution shall be levied upon any real estate, the sheriff shall divide the property, if susceptible of division, and sell only so much thereof as will be sufficient to satisfy the execution," is directory only. A violation of its injunctions will not make a sale void, but may be good ground for setting it aside. Whether it is sufficient will depend upon the circumstances of the case.

Rector v. Hartt, 8 Mo. 448, 41 Am.Dec. 650.

Mo. 1855. Collusion or contrivance to enable the purchaser at a judicial sale to obtain the land for less than its real value is cause for setting the sale aside.

Neal v. Stone, 20 Mo. 294.

Mo. 1855. Under Act March 12, 1840, requiring notice of execution to be given a judgment debtor who is a nonresident of the county in which the land to be sold is situated, where land was sold under execution without giving notice thereof to a debtor who was a nonresident of the county, the debtor was entitled to set aside the sale and have the property restored to him.

Hobein v. Murphy, 20 Mo. 447, 64 Am. Dec. 194.

Mo. 1856. A sale of land upon execution, if irregular, may be set aside by the court from which the execution issued, although not having jurisdiction of cases involving titles to land; every court having exclusive control of its own process.

Nelson v. Brown, 23 Mo. 13.

Mo. 1857. Where the purchaser at a sheriff's sale practices any deceit or trick for the purpose of gaining possession of the property, the sale may be set aside at the suit of the execution debtor.

Stewart v. Nelson, 25 Mo. 309.

Mo. 1861. Where a sheriff's sale under execution is made by him in the usual way, and at the usual place, the sale will not be set aside because the sheriff did not give special notice to the plaintiff's attorney of such sale, unless it appears that the sheriff

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promised to give such special notice, and failed so to do.

Meir v. Zelle, 31 Mo. 331.

Mo. 1869. Where a purchaser at an execution sale falsely states that he is buying for the benefit of his debtor or his family, or makes such a statement privately to persons who would otherwise have attended the sale and were kept away in consequence thereof, such statement, in conjunction with slight evidence, may be sufficient to justify a court in setting aside a sale as fraudulent; but it will be necessary to show by some evidence that persons were influenced by such statements.

Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392.

Mo. 1872. Where, on an execution sale, the property is sacrificed through interference with bidders, the purchase of the property by the persons so interfering is such a fraud upon the sale as to vitiate the title acquired thereby.

Griffith v. Judge, 49 Mo. 536.

Mo. 1873. The holder of a note given for the purchase money of land procured the maker's consent to obtain a judgment thereon merely to secure the debt, but afterwards, without his knowledge, caused the land to be sold on execution under the judgment and bought it in. *Held*, that equity would set aside the sale on payment of the note and treat the title obtained thereunder merely as security for the reimbursement of the debt.

Wright v. Barr, 53 Mo. 340.

Mo. 1875. On a motion to set aside a sale under execution on the ground that the sheriff had failed to divide the land into parcels when he exposed it for sale, and had sold the entire tract, which was unnecessary, in order to satisfy the debt, it appeared that lands of the same character were accustomed to being divided and sold for business purposes, that the land in question was susceptible of being divided into three equal parcels, and would have been sold in that way more advantageously for business purposes. A witness testified that he would have bid the amount of the debt for one-third of the land. *Held* to show that more land was levied on and sold than was necessary to satisfy the execution, in violation of Wag.St. p. 608, § 30, requiring an officer making a levy on property to divide the same and sell so much as will be necessary to satisfy the execution.

State ex rel. Beck v. Yancy, 61 Mo. 397.

Wag.St. p. 608, § 30, requiring that, when an officer makes a levy on property, he shall divide the same, if susceptible of division, and only sell so much thereof as will be necessary to satisfy the execution, is intended to prevent the needless sale of more property than is required to pay off the execution debt, and where more property is sold under execution than is sufficient to satisfy the same, and the property could have been sold in parcels, the sale will be set aside on motion of a party whose rights are affected.

State ex rel. Beck v. Yancy, 61 Mo. 397.

Mo. 1906. Where a surety had judgments against his principal and himself assigned to him for a sum less than their face, and, conspiring with an attorney who had been employed by the principal, had land belonging to the principal sold under execution, and purchased it for less than 3 per cent. of its value, the land being subject to apparent liens for a large amount, concerning which the attorney knew facts which he had learned from the principal as his client and which defeated the greater part of the liens, the execution sale was void as to the attorney and the surety.

Guinan v. Donnell, 98 S.W. 478, 201 Mo. 173.

⇐250. —— Inadequacy of price.

Inadequacy of consideration is not of itself ground for setting aside an execution sale.

Mo. 1848. Hammond v. Scott, 12 Mo. 8.

Mo. 1861. Meir v. Zelle, 31 Mo. 331.

Mo. 1874. Durfee v. Moran, 57 Mo. 374.

Mo. 1875. Whitman v. Taylor, 60 Mo. 127.

Mo. 1898. Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

Mo. 1855. Inadequacy of consideration in a sheriff's deed of lands sold under execution is not of itself any evidence of fraud.

Chouteau v. Nuckolls, 20 Mo. 442.

Mo. 1880. Where land worth $1,000 was sold under execution for $47, there was a gross inadequacy of price.

Massey v. Young, 73 Mo. 260.

Mo. 1898. An execution sale for $6 of land worth $1,500, is unconscionable, and should be set aside.

Davis v. McCann, 44 S.W. 795, 143 Mo. 172.

Mo. 1906. The petition, in a suit to set aside a sheriff's sale, alleged that the total interest of plaintiff levied on under an execution issued on a judgment exceeded $8,000 in value, that the sheriff pretended to sell all of plaintiff's interest in a lump, and that at the sale the same brought $106.

For references to other topics, see Descriptive-Word Index

Held, that the difference between the value of the interest and the price was not sufficient to justify the setting aside of the sale.

Martin v. Castle, 91 S.W. 930, 193 Mo. 188.

Mo. 1912. Sale for $100 under execution of land worth $907.75, *held* not so grossly inadequate as to warrant setting it aside.

Daugherty v. Gangloff, 144 S.W. 434, 239 Mo. 649.

Mo. 1915. Where land on execution sale did not bring one-twentieth of its appraised price, the inadequacy is such as to warrant vacation.

Siela v. Kneib, 176 S.W. 1052.

Mo. 1916. Sale on execution of property worth $1,000 to $1,200 for $20, there being a mortgage of record against it for $400, *held* not to be set aside for mere inadequacy of consideration.

Sheppard v. Enright, 188 S.W. 186.

Mo. 1917. Sheriff's sale, accident, or inadvertency of agent of judgment debtor having permitted property to be sold to purchaser at loss to judgment debtor of $600, *held* properly set aside.

Hoevel v. Hoevel, 199 S.W. 402.

Mo. 1921. In a suit to set aside execution sale, inadequacy of price is always an evidential feature of fraud, particularly where the absolute and shameless inadequacy is patent and amounts to the use of legal process to take property from the owner without compensation.

Van Graafieland v. Wright, 228 S.W. 465, 286 Mo. 414.

A creditor who secures for the fraction of 1 per cent. of its reasonable cost, the title to premises through execution sale, is guilty of fraud.

Van Graafieland v. Wright, 228 S.W. 465, 286 Mo. 414.

Mo. 1938. Although a sheriff's sale of realty under execution will not be set aside on mere inadequacy of consideration, nevertheless if the inadequacy is so gross as to amount in itself to conclusive evidence of fraud, it is a ground for canceling the transaction, and relief is granted on ground of fraud, not on ground of inadequacy of consideration.

Ellis v. Powell, 117 S.W.2d 225.

Mo. 1950. The consideration for sheriff's deed, conveying city lot to persons purchasing it at sheriff's sale in execution of $109.55 judgment for $450, which was only $150 less than its approximate value at time of tax sale thereof less than year before execution sale and more than half of amount which persons contracting to purchase lot from purchasers at execution sale agreed to pay therefor three weeks after such sale, was not shockingly inadequate.

Adams v. Smith, 232 S.W.2d 482, 360 Mo. 1082.

Mo. 1952. A bid at sheriff's sale and a consideration in amount of $37.50 for property of fair market value of $3,500 was so grossly inadequate as to shock conscience, and justified setting aside sheriff's sale and cancellation of sheriff's conveyance on ground of fraud.

Hart v. Parrish, 244 S.W.2d 105.

Mo. 1953. Generally, a sheriff's sale of realty under execution will not be set aside for mere inadequacy of consideration, but such gross inadequacy of consideration as amounts to conclusive and decisive evidence of fraud is ground for cancelling sale.

Wieser v. Linhardt, 257 S.W.2d 689.

Disparity between sale price of unimproved lot, purchased at execution sale for sum of $289.97 required to satisfy judgment in full, including all costs, and value of lot, found by chancellor to be $6,000, was so great as to warrant cancellation of sale for fraud established by such gross inadequacy of consideration as to shock conscience.

Wieser v. Linhardt, 257 S.W.2d 689.

Mo.App. 1905. Mere inadequacy of price does not justify setting aside a sheriff's sale of land under a proper judgment, unless the inadequacy is such as to shock the moral sense.

State ex rel. Reed v. Elliott, 90 S.W. 122, 114 Mo.App. 562.

Mo.App. 1909. Where, on an application to set aside an execution sale of lots, there was no evidence as to the value, a contention that they were sold at a grossly inadequate price was not sustained.

Irondale Bank v. Terrill, 116 S.W. 481, 135 Mo.App. 472.

Mo.App. 1934. Judgment creditor's bid of $230 at execution sale for real property valued from $5,000 to $7,500 *held* not so inadequate as to avoid sale where property was subject to long overdue incumbrance of $1,500 and interest, and at time of sale was in charge of receiver.

Swabey v. Boyers, 71 S.W.2d 110.

⇐251. —— Inadequacy of price in connection with other objections.

⇐251(1). In general.

Mo. 1848. Where a sheriff sold under execution an undivided interest in two adjoining tracts of land for a trifling consideration, and at an earlier hour in the morning than was usual for sales, the sale in all re-

For later cases see same Topic and Key Number in Pocket Parts

gards being conducted in a legal manner, it was *held* to be a valid sale.

Hammond v. Scott, 12 Mo. 8.

Mo. 1869. Where a sheriff's return upon an execution which had been levied upon certain shares of stock showed neither an advertisement nor public sale of the stock, and the only evidence of a sale was a mere memorandum or calculation of a sum of money made by some sale, indorsed on the back of the execution, and the price shown to be realized was greatly inadequate, the sale should be set aside on motion.

Mechanics' Bank v. Pitt, 44 Mo. 364.

Mo. 1894. Where a judgment creditor sells under execution the debtor's interest in property subject to a fraudulent mortgage, inadequacy of price, together with want of knowledge of all parties to the sale of the fraudulent character of the mortgage, are insufficient to avoid the sale at the creditor's instance.

Knoop v. Kelsey, 26 S.W. 683, 121 Mo. 642, 22 Am.St.Rep. 777.

Mo. 1898. In an action to set aside a sheriff's sale, the complaint alleged that the property was sold under two mechanics' liens prior in right to plaintiff's lien; that defendant purchased the property, but the amount paid was totally inadequate; that at the time of sale plaintiff was unable, through poverty, to bid on the property, which was sold at a season when real-estate sales were dull; that defendant (who was interested in one of the companies holding one of the prior liens) and the sheriff combined to cut off plaintiff from all rights under his lien. The property was sold on July 16th, although the deed was acknowledged by the sheriff on June 21, 1894, and no order of sale was ever made by the court. *Held* not to state a cause of action.

Kearney v. Boeckler, 44 S.W. 721, 143 Mo. 60.

Mo. 1908. Where there is gross inadequacy of price, coupled with some evidence of fraud or unfairness, an execution sale may be set aside.

Walker v. Mills, 109 S.W. 44, 210 Mo. 684.

Mo. 1921. Property must not be confiscated by legal process through fraudulent methods, and courts should inquire with some care whether transaction constitutes an honest attempt to collect a debt, or results from a desire to use wrongfully and oppressively the process of the court to obtain another's property without adequate consideration.

Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

Mo. 1935. Setting aside sale under execution of judgment for benefits in condemnation suit by city on motion of purchaser at foreclosure sale *held* not error where city had no objection, purchaser at foreclosure sale relied on city's custom to notify all interested parties when execution was issued, and property worth $21,000 to $24,500 was sold for $265.

City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.

Mo.App. 1895. Where, on a motion to set aside a sale on execution for failure to notify defendant of his homestead rights, gross inadequacy of price, etc., it appeared that the land was sold for one-eightieth of its value, and the inference from the testimony of the execution defendant is that he was not fairly dealt with by the officer, that he was misled by the assurances of such officer, and that he was not apprised of his homestead rights or of the fact that his land would be sold, and it appeared that defendant did not understand that his land was advertised or would be sold, the sale was properly set aside.

Warder-Bushnell-Glesser Co. v. Allen, 63 Mo.App. 456.

⇐251(2). Irregularities affecting sale.

Mo. 1856. If a judgment creditor at a sale of land on execution bid a certain sum, with an understanding between him and the officer that that sum shall be increased or lessened to the amount of the expenses of the sale, the proceedings will be set aside as irregular; it appearing that the price was so grossly inadequate as to awaken suspicion of the fairness of the conduct of the parties.

Nelson v. Brown, 23 Mo. 13.

Mo. 1869. Where property worth $2,000 was sold under execution for $25, and the sale was made after the hour when other sales advertised for that day had been made, and after the bidders assembled had gone away, the sale was properly set aside on motion, since the inadequacy of price, when taken in connection with the other circumstances, was sufficient to show fraud.

Parker v. Hannibal & St. J. R. Co., 44 Mo. 415.

Mo. 1874. At a sale under execution of A.'s interest in certain land, B. and S., two of the bidders, entered into an agreement that S. should not bid, and that B. should purchase the land and give S. one-third interest therein. B. purchased the land for $7.74. It was shown that A.'s interest was worth over $100. *Held*, that the sale should be set aside.

Durfee v. Moran, 57 Mo. 374.

For references to other topics, see Descriptive-Word Index

Mo. 1885. Execution was issued on a judgment against defendant, under which the sheriff levied on shares of corporate stock held by defendant. Defendant's attorney inquired at the sheriff's office as to the time at which the sale of the stock would take place, and was informed that it would not take place until 12 o'clock. The sale actually took place at 10 o'clock, and defendant's attorney ascertained that the sale was in progress while he was preparing to take an appeal from the judgment. He at once notified the deputy sheriffs, who were selling the stock, that they had no right to sell the stock at that hour, and also made the same statement to the sheriff, coupled with a request to him to stop the sale. The shares were sold in a lump, and the sum realized was very much smaller than their real value. *Held*, that the sale should be set aside.

American Wine Co. v. Scholer, 85 Mo. 496, affirming 13 Mo.App. 345.

Mo. 1895. A sale on execution may be vacated where it is shown that the price paid therefor was grossly inadequate, and that the interested parties had no knowledge of the sale; they relying upon the sheriff's custom to notify such parties of the intended sale, which custom was not observed.

Rogers & Baldwin Hardware Co. v. Cleveland Bldg. Co., 32 S.W. 1, affirmed 34 S.W. 57, 132 Mo. 442, 31 L.R.A. 335, 53 Am.St.Rep. 494.

Mo. 1896. A sale on execution, under a mechanic's lien judgment, of property worth $40,000 for $250, to the attorney of plaintiff, should be set aside, on motion of a subsequent mortgagee,—it appearing that the notice of sale, while technically correct in describing the property, did not call attention to the fact that it was the property known as the "Opera-House Property"; that the sheriff did not know he was selling such property; that the judgment had been obtained without the knowledge of the mortgagee's attorney; and that they had been misled, by a statement of plaintiff's attorney to think there was no judgment at the time, though the purchaser agreed with others holding liens not reduced to judgment, aggregating $11,000, that they should share in the benefit of the purchase.

Rogers & Baldwin Hardware Co. v. Cleveland Bldg. Co., 34 S.W. 57, 132 Mo. 442, 31 L.R.A. 335, 53 Am.St.Rep. 494, affirming 32 S.W. 1.

Mo. 1896. A sale on execution against a married woman under judgments aggregating $58, not shown to be for necessaries, will be set aside as against the purchaser, where the latter, a clerk of the court, issued the executions without the knowledge of plaintiffs, and the property, which was occupied as a homestead, and worth $5,000, was sold for $5, in one parcel, though susceptible of division, none of the parties to the judgment having notice of the sale.

Donham v. Hoover, 36 S.W. 627, 135 Mo. 210.

⇐252. —— Advance on bid.

For cases from other jurisdictions, see other Key Number Digests.

⇐253. —— Application and proceedings thereon.

⇐253(1). In general.

Mo. 1846. The purchaser at a sheriff's sale and all claiming under him must be notified of a motion to set aside the sale. Notice to the purchaser at the sheriff's sale would not be sufficient.

Clamorgan v. O'Fallon, 10 Mo. 112.

Mo. 1875. The fact that the execution debtor joined with the purchaser of his interest in a motion to set aside a sale under the execution, on the ground that the sheriff had failed to divide the property levied on and had sold more than was necessary for the satisfaction of the execution, does not have the effect of denying to the purchaser his right to have the sale set aside on proving the allegations, though the execution debtor should not have been joined in the motion; he having parted with all his interest.

State ex rel. Beck v. Yancy, 61 Mo. 397.

Mo. 1883. On a motion to set aside an execution sale and award a writ of venditioni exponas in respect to the property levied on, an objection that the moving party had set out the facts on which he rested his claim for relief with as much fullness as if he were seeking the same relief through a bill in equity was of no merit.

American Wine Co. v. Scholer, 13 Mo. App. 345, affirmed 85 Mo. 496.

Mo. 1884. A purchaser at a judicial sale cannot object that the plaintiff in the execution and the sheriff who made the sale were not made parties to proceedings to set it aside.

McKee v. Logan, 82 Mo. 524.

Mo. 1891. The court has complete control over its own process, and has the power to set aside an execution sale at or before the return term of the writ.

City of St. Louis v. Brooks, 18 S.W. 22, 107 Mo. 380.

Mo. 1912. One attacking an execution sale *held* bound to show that there were no prior liens or judgments, subject to which the notice of sale stated the land would be sold.

Daugherty v. Gangloff, 144 S.W. 434, 239 Mo. 649.

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Mo. 1927. Finding that bond on appeal was not obtained by fraud *held* sustained under evidence, in surety's action to set aside sheriff's deed under judgment on bond.

Spring v. Giefing, 289 S.W. 825, 315 Mo. 525.

Evidence *held* to sustain finding that levy and sale under execution were regular, in action by judgment debtor to set aside sheriff's deed.

Spring v. Giefing, 289 S.W. 825, 315 Mo. 525.

Notice of motion to set aside execution sale must be given to all parties having interest or who will be prejudiced by setting sale aside.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Notice of motion to set aside execution sale may be waived by appearance or by failure to object at proper time.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Where party appears and opposes motion to set aside execution sale, he cannot complain notice was not given to other parties.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Persons with interest in stock sold at execution sale who appeared and resisted motion to set aside sale waived notice of such motion.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Transferee of stock sold at execution sale unknown by judgment debtor was not entitled to notice of motion to set aside execution sale filed at return term of court.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Mo. 1930. Motion to set aside execution sale, filed in court and in proceedings from which execution emanated, is proper and plenary proceeding to that end.

State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Motion to set aside execution need not be verified. Rev.St.1919, § 1675, V.A.M.S. § 513.360.

State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Judge with jurisdiction over case could not give person who acquired interest in stock under execution sale right to institute proceedings elsewhere, so as to bind execution debtor without his consent.

State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. In motion to set aside execution sale of corporation's stock, affording all parties plenary hearing, necessity to appoint receiver for corporation, *held* not shown; no fact showing immediate peril to rights of parties being pleaded.

State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Mo. 1935. Court had jurisdiction to set aside execution sale during whole of return term, even though sheriff's deed had been executed and recorded before motion was filed to set aside sale.

City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.

All persons who have interest in sale or will be prejudiced by setting it aside should be defendants to motion to set aside execution sale.

City of St. Louis v. Miller, 82 S.W.2d 579, 336 Mo. 1122, certiorari denied Evans v. Missouri State Life Ins. Co., 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 430, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472.

Mo. 1953. Where Supreme Court modified alimony judgment by reducing amount of alimony and by staying execution until wife relinquished, inter alia, her inchoate dower interest in described land, subsequent overruling by trial court of husband's motion to set aside execution sale wherein wife bid in the land, which sale had been held pending appeal, was an "irregularity" within statute relating to motion to set aside judgment for irregularity. V.A.M.S. § 511.250.

Carr v. Carr, 253 S.W.2d 191.

Husband's motion to set aside execution sale of land for enforcement of alimony judgment, which sale had been held pending appeal from such judgment, would not be treated as writ of error coram nobis or as a petition in equity.

Carr v. Carr, 253 S.W.2d 191.

For references to other topics, see Descriptive-Word Index

Purchaser at foreclosure sale was a proper party to file motion to set aside execution sale.

Carr v. Carr, 253 S.W.2d 191.

Mo.App. 1942. Purchaser at execution sale was a "necessary party" to a proceeding to set sale aside.

State ex rel. Weber v. McLaughlin, 157 S. W.2d 800.

⇐253 (2). Time for application.

Mo. 1856. A motion to set aside proceedings under an execution for irregularity should be made at the return term. If afterwards, the application should be by bill, by which all the parties interested may be brought in; but, if return of the execution be not made till a subsequent term, that is seasonable for making such motion.

Nelson v. Brown, 23 Mo. 13.

Mo. 1883. Where a motion to set aside an execution sale and award a writ of venditioni exponas was made on the first day of the term after the sale took place, which was the return day of the fieri facias, there could be no objection to the jurisdiction growing out of any delay in instituting the proceedings.

American Wine Co. v. Scholer, 13 Mo. App. 345, affirmed 85 Mo. 496.

Judgment was rendered in the circuit court, and on appeal to the supreme court was affirmed, and an execution under which the sale was held was issued out of the supreme instead of the circuit court. *Held* that, though the sale under that execution might have been voidable if the irregularity in its issuance had been taken advantage of in time yet after the lapse of 50 years the validity of the sale would not be questioned.

Mo. 1892. Block v. Morrison, 20 S.W. 340, 112 Mo. 343.

Mo. 1892. Davis v. Smith, 20 S.W. 344.

Mo. 1898. Proceeding by motion to recall an execution and to set aside the sale made after the sale, but before the return term of the writ, is a proper method to correct an illegality in the sale.

City of Aurora ex rel. Williams v. Lindsay, 48 S.W. 642, 146 Mo. 509.

Mo. 1899. A motion to set aside a sale under execution is too late after the term at which the sale occurs has passed; the remedy being by bill in equity.

Force v. Van Patton, 50 S.W. 906, 149 Mo. 446.

Mo. 1916. Where property was sold on execution to party acting for owner's attorney in a suit, as the owner claimed it was the owner's duty, if aggrieved, to act promptly to set aside the sale before the rights of innocent parties intervened, and setting up his claim in an answer to the attorney's suit to determine title was unavailing.

Sheppard v. Enright, 188 S.W. 186.

Mo. 1930. Motion to set aside execution sale, filed in term execution was returnable, *held* filed at proper term, though sale occurred in previous term.

State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. Motion to set aside execution sale filed in term execution was returnable *held* filed in time to invest court with jurisdiction.

State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

Mo.App. 1909. A levy and sale on execution may be attacked at the return term of the writ.

Irondale Bank v. Terrill, 116 S.W. 481, 135 Mo.App. 472.

⇐254. —— Hearing and determination.

Mo. 1910. An execution was made returnable to the October term, 1871, of the St. Louis county circuit court, which was the first term after the execution was issued on May 27, 1871. The officer selling the land failed to subdivide it, but sold it in a lump. The execution defendant filed a motion in the circuit court of St. Louis county to have the sale set aside on that ground. The court denied the motion, and no appeal or writ of error from the judgment was taken. The land sold was situated in another county. *Held*, that the decision of the circuit court of St. Louis county was res judicata on the issue of the validity of the sale; the execution debtor having acted in compliance with Gen.St.1865, c. 160, § 4, in force at the time.

Norman v. Eastburn, 130 S.W. 276, 230 Mo. 379.

⇐255. —— Security or other conditions.

Mo. 1906. Where a tenant in possession of real property became a purchaser at an attachment sale thereof, and the evidence was conflicting as to whether he notified the owner, who was served only by publication of the proceedings, and he attempted to prevent other persons from bidding at the sale, there was no error in not requiring a return of the money paid by him before the setting aside of the sale under the attachment judgment.

Silling v. Hendrickson, 92 S.W. 105, 193 Mo. 365.

Where the property of an heir of a wife was taken and sold under attachment as the

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property of the husband, the heir is entitled to have the attachment set aside without first tendering to the purchaser the amount he paid for the property.

Siling v. Hendrickson, 92 S.W. 105, 193 Mo. 365.

Mo. 1953. Where execution sale of husband's realty for enforcement of alimony judgment was premature because appeal was pending and was based on a larger alimony judgment than that subsequently authorized by Supreme Court, husband would not be required to tender amount due under modified judgment before moving to set aside execution sale under which wife had purchased the land. V.A.M.S. § 511.250.

Carr v. Carr, 253 S.W.2d 191.

⇐256. Actions to set aside sale.

⇐256(1). In general.

Mo. 1883. A memorandum of a judgment appearing in the judgment docket may be sufficient to support an execution, though there is no formal judgment spread upon the records of the court; and where there has been a judicial sale of property of the judgment debtor under execution issued under such judgment, the appropriate remedy to avoid the effect of a sheriff's deed executed in pursuance of such sale is an action to annul the deed, and not an action of ejectment.

Beedle v. Mead, 81 Mo. 297.

Mo. 1906. Where an execution plaintiff who purchased at the execution sale knew the facts which defeated apparent liens which prevented other persons from bidding at the sale, he was not entitled to a refund of the amount paid at the sale as a condition to the setting aside of the sale.

Guinan v. Donnell, 98 S.W. 478, 201 Mo. 173.

Mo. 1907. Where a wife asserts her ownership of the entire interest in property, the deed to which was taken in the name of herself and husband, as soon as one who purchased the husband's alleged interest at execution sale sought to disturb her rights, she was not guilty of laches, since the doctrine of laches will not be applied with nice particularity to dealings between husband and wife.

Hudson v. Wright, 103 S.W. 8, 204 Mo. 412.

Mo. 1909. One seeking to cancel a deed executed to the purchaser under an execution sale need not necessarily attack the validity of the judgment, but may have the deed canceled on the ground of the invalidity of the sale.

Shelton v. Franklin, 123 S.W. 1084, 224 Mo. 342, 135 Am.St.Rep. 537.

A suit in equity to cancel a deed issued to a purchaser upon execution, on the ground of irregularities in the sale, being in the nature of a motion to set aside the sale, should be brought within a reasonable time after the judgment debtor learns of such irregularities.

Shelton v. Franklin, 123 S.W. 1084, 224 Mo. 342, 135 Am.St.Rep. 537.

Mo. 1914. A bill to set aside a sheriff's sale of certain property claimed by complainants as their homestead *held* not objectionable on the ground that complainants had a remedy at law by defense to defendant's action in ejectment.

Pocoke v. Peterson, 165 S.W. 1017, 256 Mo. 501.

Mo. 1914. Where an execution debtor was present at the sale, in the hope that, by an arrangement with defendant, the successful bidder, the property could be made to yield nothing for his creditors, and the successful bidder at the sale was there to assist him, equity would not at debtor's suit set aside the sale.

Ferguson v. Robinson, 167 S.W. 447, 258 Mo. 113.

Mo. 1931. Judgment defendant, bringing action to set aside sale under execution four years after sale, *held* not guilty of laches, where it was disputed that she waited any considerable time after she knew of sale.

Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

⇐256(2). Pleading and evidence.

Mo. 1871. In a suit to set aside an execution sale of land, the evidence considered, and *held* insufficient to show that any improper means were resorted to, that there was any connivance or fraud practiced for the purpose of cheating or overreaching the plaintiff, that there was any inadequacy of price, or that the sale was conducted otherwise than with honesty.

Stewart v. Severance, 47 Mo. 366.

Mo. 1877. An attorney, who had been retained to collect a debt, bought in his own name land which was sold under execution to satisfy the debt, contrary to the instructions of his client, and nine years afterwards, after the attorney had died, and after some of the land had been sold, the client sued to have the sale to the attorney set aside, the lapse of time, the death of the attorney, and the sale of a portion of the land appeared on the face of plaintiff's petition; but, instead of stating when plaintiff first learned of the purchase, plaintiff merely alleged that he had no knowledge of the fact until a long time after the sale. *Held*, that the petition was demurrable, in that it showed laches on the face of it.

Bliss v. Prichard, 67 Mo. 181.

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Mo. 1880. In an action by an execution debtor to set aside the sheriff's sale of land under the execution on the ground of fraud, it was error not to permit plaintiff to introduce the sheriff's deed in evidence, and the execution and return thereon.

Massey v. Young, 73 Mo. 260.

In an action to set aside a sheriff's deed of land sold under execution on the ground of fraud, it appeared that an undivided one-third interest in 440 acres of land worth $1,000 was sold for $47 to one who, while he had not been technically appointed the deputy sheriff, was the clerk of the sheriff, gave receipts for money in his name, investigated titles, etc., and that the bid of such person was transferred to another who took the deed. The execution creditor testified that he instructed his attorney to bid up at the sale to the amount of his judgment, which was for over $200, and it appeared that the one in whose name the deed was taken did not enter into the transaction until after he had consulted with the execution creditor's attorney, and there was evidence that immediately after the bid the bidder became alarmed about getting mixed up in a suit and that he feared that the court would set aside the sale. *Held*, that the evidence warranted a finding of fraud, whereby plaintiff was deprived of his land and the execution creditor of the satisfaction of his debt.

Massey v. Young, 73 Mo. 260.

Mo. 1906. The petition, in a suit to set aside a sheriff's sale, alleged that plaintiff was the surety on notes executed by his wife; that the notes were procured by defendants, the wife's heirs, and turned over to third persons without consideration for the purpose of compelling plaintiff to pay the notes and relieve the estate of the wife from liability therefor; that the third persons obtained judgment on the notes against plaintiff; and that his interest was sold at sheriff's sale. *Held*, insufficient to justify the setting aside of the sale on the ground of a fraudulent combination to defraud plaintiff.

Martin v. Castle, 91 S.W. 930, 193 Mo. 183.

Mo. 1921. The extent of inadequacy of consideration which constitutes proof of fraud in an execution sale is that which shocks the conscience; that is to say, the sense of right and wrong inherent in every person by virtue of his existence as a social entity; good conscience being a synonym of equity.

Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

In owners' suit to set aside sheriff's sale and deeds under a judgment in favor of one of the defendants against the contractor and the owners, evidence *held* to show fraud, between such defendant and contractor to procure title for defendant to valuable property for a very small fraction of its value, by deceiving the plaintiff owners.

Van Graafeland v. Wright, 228 S.W. 465, 286 Mo. 414.

Mo. 1921. In a suit to quiet title to 40 acres sold under execution, evidence *held* insufficient to show a conspiracy between the purchaser and one to whom he subsequently sold to keep down the price or to show that the price was so inadequate as to warrant setting the sale aside.

Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.

Mo. 1922. In a suit to set aside an execution sale of capital stock, evidence *held* to show that all the capital stock of a certain corporation was owned by the husband, though some of the stock was held in the name of the wife and children, and that the purchaser at the sale under execution against the wife knew and recognized such ownership.

Rookery Realty, Loan, Inv. & Bldg. Co. v. Johnson, 243 S.W. 123, 294 Mo. 461.

⇐257. Effect of setting aside sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐258. Collateral attack on sale.

U.S.Mo. 1850. Where the description of property to be sold under execution is sufficient, though a part false, the sale will not be invalidated in a collateral proceeding. Where there is any error or irregularity in the execution or judgment under which a sale is made, the sale will not be invalidated in a collateral proceeding.

Landes v. Brant, 51 U.S. 348, 10 How. 348, 13 L.Ed. 449.

U.S.Mo. 1855. Under Act Mo. Jan. 25, 1817, providing that lands of a deceased debtor shall be liable to sale under execution after 18 months from the date of letters of administration, the claim that the sale of lands of a deceased debtor under execution was void, because made before the expiration of the 18 months from the issuance of letters of administration, cannot be raised in a collateral proceeding in ejectment.

Griffith v. Bogert, 59 U.S. 158, 18 How. 158, 15 L.Ed. 307.

Mo. 1846. Irregularities in a sheriff's sale cannot be taken advantage of in a col-

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lateral proceeding, but only in a direct application for that purpose.

Reed v. Austin's Heirs, 9 Mo. 722, 45 Am.Dec. 336.

A sale under a voidable judgment cannot be impeached in a collateral proceeding.

Reed v. Austin's Heirs, 9 Mo. 722, 45 Am.Dec. 336.

Mo. 1848. Where the description of property to be sold under execution is sufficient, though a part false, the sale will not be invalidated in a collateral proceeding. Where there is any error or irregularity in the execution or judgment under which a sale is made, the sale will not be invalidated in a collateral proceeding.

Landes v. Perkins, 12 Mo. 238.

Mo. 1852. It may he shown that a sale under execution was collusive or fraudulent, or that there was a secret reservation of a trust in favor of the execution debtor, with the consent of the purchaser.

Dallam v. Bowman, 16 Mo. 225.

Mo. 1866. A sale under a satisfied judgment is void, and not merely voidable, as against a purchaser with notice of the fact and in bad faith.

Weston v. Clark, 37 Mo. 568.

Mo. 1870. A sheriff's sale cannot be impeached because the execution in the justice's court was returned unsatisfied sooner than the time authorized by law. For such irregularities the execution may be quashed in direct proceedings for that purpose, but not in collateral proceedings, when the rights of third parties have intervened.

Norton v. Quimby, 45 Mo. 388.

Mo. 1872. Where a stranger purchased land at an execution sale, it cannot be impeached in an action of ejectment, but must be done by a direct proceeding,—either by motion to set aside the sale or by a bill in chancery.

Groner v. Smith, 49 Mo. 318.

Mo. 1872. In a suit for land claimed under sale on execution issued from the circuit court on a justice's transcript filed therein, the failure of the record to show affirmatively that the execution from the justice's court was issued to a constable of the township where the defendant resided will not invalidate the title held under the sale in a collateral proceeding. For the purpose of any such proceeding the title is valid, and parol evidence therein to show that at the time of the issue of the justice's execution and the constable's return defendant in the execution lived in another township is improper.

Waddell v. Williams, 50 Mo. 216.

Mo. 1874. The omission in a notice by publication issued in an attachment to state the amount of damages claimed does not render the subsequent proceedings and judgment void, so that the title of a purchaser at a special execution sale made thereunder may be attacked collaterally.

Holland v. Adair, 55 Mo. 40.

Mo. 1874. Where a writ of attachment is valid, conforming substantially to the statutory requirements, and issued by the clerk in conformity with the power vested in him, the court obtains jurisdiction over the property, and, though the order of publication be defective, the judgment of the court and sale of the property will not be thereby invalidated in a collateral proceeding.

Kane v. McCown, 55 Mo. 181.

Mo. 1874. The fact that the published order in an attachment suit purported to have been made by the order of the clerk, instead of that of the court, as stated in the original order, will not vitiate a sale of land under it in a collateral proceeding.

Johnson v. Gage, 57 Mo. 160.

Mo. 1874. In ejectment for land bought at sheriff's sale, mere irregularities which do not render the deed absolutely void cannot be inquired into.

Hewitt v. Weatherby, 57 Mo. 276.

Mo. 1875. Where judgment is obtained in a suit by attachment, and between the levy of execution and sale defendant dies, his death, not being brought to the knowledge of the sheriff or the purchaser, will not render the sale and deed thereunder nullities, which may be, for that reason, impeached in a collateral proceeding, although the law relating to attachment (sections 43, 45, 46) and the law relating to judgments and executions forbid the sheriff to proceed after the death of defendant.

Lewis v. Coombs, 60 Mo. 44.

Mo. 1877. If a sheriff's sale was made on a day other than that called for in the advertisement of sale, defendant in the execution, if damaged thereby, or his creditors, might by a timely application have had the sale set aside; but the purchaser being a stranger to the execution, and there being no evidence in any way connecting him with the mistake, or tending to show that the mistake was a fraudulent one, and the deed of the sheriff being good on its face, its validity for such irregularity could not be assailed in a collateral action brought after the lapse of 50 years.

Houck v. Cross, 67 Mo. 151.

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Mo. 1887. The sheriff's failure to post the required notice at the courthouse door affords ground for setting aside his sale in a direct proceeding for that purpose by the interested parties, but it cannot affect the title of an innocent purchaser without notice in a collateral proceeding.

Evans v. Robberson, 4 S.W. 941, 92 Mo. 192, 1 Am.St.Rep. 701.

Mo. 1892. Though by statute the sheriff is required to divide land to be sold under execution, when it is susceptible of division, and to sell only so much as is sufficient to satisfy the execution, yet, if he does not comply with the statute, the sale is not void, and cannot be questioned in a collateral proceeding.

Lewis v. Whitten, 20 S.W. 617, 112 Mo. 318.

Mo. 1905. Rev.St.1899, § 4019, V.A.M.S. § 517.780 note, provides, relative to the issuance of an execution from the circuit court on a justice's transcript, that no execution shall be sued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable "of the township in which the defendant resides," if there be one in such township, and, if not, to any constable in the county, and returned that the defendant had no goods or chattels whereof to levy the same. *Held*, that a sale of land on execution issued on a justice's transcript cannot be attacked collaterally on the ground that the justice's execution was issued to the wrong constable.

Ables v. Webb, 85 S.W. 383, 186 Mo. 233, 105 Am.St.Rep. 610.

Under such statute a sale of real estate on execution based on a justice's transcript cannot be collaterally attacked because the justice's execution was returned before the return day.

Ables v. Webb, 85 S.W. 383, 186 Mo. 233, 105 Am.St.Rep. 610.

Mo. 1907. Where a sale is made under an execution based on a void judgment, it may be attacked in collateral proceedings.

Davis v. Montgomery, 103 S.W. 979, 205 Mo. 271.

Mo. 1910. The failure of the officer selling land under execution to subdivide the land is an irregularity of which the execution defendant alone may take advantage, and a grantee in a deed executed by the attorney in fact of the execution defendant subsequent to the sale cannot collaterally attack the sale on the ground that the land was sold in lump.

Norman v. Eastburn, 130 S.W. 276, 230 Mo. 168.

Mo. 1945. In action to determine title and in ejectment, defendant who was held to have no interest in realty was not entitled to challenge plaintiff's title to realty on ground that purchase price paid by plaintiff at sheriff's sale for realty was so inadequate as to shock the conscience.

Kilbourn v. Kilbourn, 190 S.W.2d 206, 354 Mo. 17.

Mo.App. 1902. Though a certain judgment forming the basis of the controversy in an action in a justice's court could not be attacked therein, the invalidity of the levy of an execution issued on such judgment and of a sale of the property under a writ of venditioni exponas could be shown in such action.

Caffery v. Choctaw Coal & Mining Co., 68 S.W. 1049, 95 Mo.App. 174.

⇐259. Presumption of validity.

Mo. 1876. Though an execution is erroneously directed generally against both goods and chattels and lands and tenements, without specifying that the latter could be sold only in the event that no sufficient goods and chattels could be found, it will be presumed, in ejectment proceedings 50 years thereafter, that the officer, in levying on and selling the lands, acted in accordance with the law, having first ascertained that there were not sufficient goods and chattels, and the sale thereof will be held valid.

Baker v. Underwood, 63 Mo. 384.

(B) TITLE AND RIGHTS OF PURCHASER.

⇐260. Nature and effect of transfer in general.

Mo. 1852. Where the plaintiff in ejectment offered in evidence a transcript of a justice's judgment which had been filed in the circuit court, an execution issued from the circuit court and purporting to be upon a judgment of that court, and a sheriff's deed reciting this execution and stating a sale under it, were inadmissible, as such execution was on a different judgment than the one in evidence.

Blain v. Coppedge, 16 Mo. 495.

Mo. 1864. Where an execution issued to the sheriff has been amended or altered at the request of plaintiff, a sheriff's sale and deed to the plaintiff for land of the defendant will not pass the title.

Trigg v. Ross, 35 Mo. 165.

Mo. 1874. A bidder at a sheriff's sale acquires no title until the money is paid and the deed is executed.

Leach v. Koenig, 55 Mo. 451.

Mo. 1876. One who purchases land of a debtor at execution sale may be held to be

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a mortgagee in respect to such debtor to the same extent as though the purchase was at a private sale.

Matson v. Capelle, 62 Mo. 235.

Mo. 1888. No title to land sold at sheriff's sale passes except on delivery of the deed.

Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.St.Rep. 307.

Mo. 1894. Where stock pledged as collateral is levied on and sold under process, the purchaser cannot be deprived of his rights under the levy by any arrangement between the pledgor and pledgee thereafter made.

McClintock v. Central Bank, 24 S.W. 1052, 120 Mo. 127.

Mo. 1903. Where the claim to title by defendant in an action to quiet title was based solely on an execution against a husband who had, previous to judgment, conveyed the property to a trustee for the benefit of his wife, he was not in a position to question the regularity of the proceedings whereby the court had substituted a trustee for the one named in the husband's conveyance, who, together with the beneficiary and the husband, had conveyed the premises to plaintiffs, as defendant acquired nothing by his purchase at the execution sale.

Ball v. Woolfolk, 75 S.W. 410, 175 Mo. 278.

Mo. 1905. Where, after a judgment creditor purchased land at sale under execution based on the judgment, his interest in the land was sold under execution against him, and thereafter he caused the land to be again sold under an execution based on his judgment, and plaintiff purchased it, and on motion the judgment creditor was awarded the proceeds, the purchaser on the second sale was not estopped to assert title against plaintiff, such purchaser having been no party to the motion and order for the third levy.

Ables v. Webb, 85 S.W. 383, 186 Mo. 233, 105 Am.St.Rep. 610.

Mo.App. 1882. Decree vesting in execution purchaser title of land fraudulently conveyed. See,

Lallement v. Poupeny, 12 Mo.App. 580, memorandum.

⇐262. Property passing by sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐263. Estate or interest acquired.

⇐264. —— In general.

Mo. 1859. One who held land by adverse possession died before the time of limitation was complete, devising his estate to his widow, who remained in possession, not claiming under the will, but under an understanding with her children that she should remain in possession for life. The limitation became complete while she was in possession and her interest was levied on under a judgment against her and sold. *Held*, that the purchaser took subject to the agreement between her and her children, whether he had notice of it or not.

Chouquette v. Barada, 28 Mo. 491.

Mo. 1864. The purchaser under execution after the judgment lien has expired takes only such title as defendants had at the date the execution was issued.

Crittenden v. Leitensdorfer, 35 Mo. 239.

Mo. 1866. The purchaser under execution of corporation stock subject to a mortgage is entitled, on the sale thereof by the mortgagee, to any surplus remaining after the payment of the mortgage debt.

Foster v. Potter, 37 Mo. 525.

Mo. 1870. A sale of shares of stock of an incorporated company under execution will not vest title thereto in the purchaser, if the defendant in the execution possessed no title.

Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am.Dec. 388.

Mo. 1872. A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title.

White v. Davis, 50 Mo. 333.

Mo. 1884. Where execution under a judgment rendered against two defendants jointly was levied on the interest of one defendant in a tract of land owned by the two, and the marshal's deed only purported to pass the interest of that defendant, the interest of the other did not pass.

Frederick v. Missouri River, Ft. S. & G. R. Co., 82 Mo. 402.

Mo. 1893. At a sale on execution the purchaser takes only the interest of the defendant in execution.

Rosenberger v. Jones, 24 S.W. 203, 118 Mo. 559.

A purchaser of land at an execution sale acquired only such interest as the judgment debtor had at the date of the judgment on which the execution was based.

Mo. 1906. Jones v. Hubbard, 90 S.W. 1137, 193 Mo. 147.

Mo. 1906. Jones v. Rose, 90 S.W. 1142.

Mo.App. 1918. Sheriff's deed to land sold on execution contains no warranty that judgment debtor has any title, and does not

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divest or purport to divest title of any one save judgment debtor.

Pritchard v. People's Bank of Holcomb, 200 S.W. 665, 198 Mo.App. 597.

Mo.App. 1942. Purchaser of automobile at execution sale was charged with knowledge that he was taking title subject to power of court to set aside proceeding for good cause shown at return term of the execution and title acquired was not absolute but only conditional.

State ex rel. Weber v. McLaughlin, 157 S.W.2d 800.

Mo.App. 1943. A purchaser at an execution sale acquires no greater right than the execution defendant had at the time of the levy.

State ex rel. and to Use of Dietrich v. Schade, 167 S.W.2d 135.

⇐265. — Particular estates or interests of debtor.

Mo. 1853. A. sold land to B., and executed a bond to make title upon the payment of the purchase money in four installments. After B. had paid two installments, A. recovered judgment for the third, and caused the execution to be levied on the land. At the execution sale the land was bought by C., A. being present and bidding. It was *held* that C. only purchased B.'s right to a deed on payment of the balance of the purchase money.

Phillips v. Edmonson, 17 Mo. 579.

Mo. 1857. The execution purchaser of partnership property, or a portion thereof, sold on execution against a single partner, levied upon his interest therein, acquires only the interest of the debtor partner in the property.

Wiles v. Maddox, 26 Mo. 77.

Mo. 1859. Where a lease is made to five persons in their individual names, and not as partners, and the interest of one is levied on and sold under execution against him, in an action by the purchaser for partition of the leasehold premises, it was *held* that at law the lessees were regarded, prima facie, as holding as tenants in common, and that the plaintiff was entitled to the apparent interest of the execution debtor, unless he had notice of the defendants' equity, or could have fairly inferred it from circumstances.

Cowden v. Cairns, 28 Mo. 471.

Mo. 1885. Where a creditor levied an execution on the proceeds of property in which the debtor had a contingent remainder, the creditor, who had purchased the property at an execution sale, was not entitled to an order securing him the contingent interest of his debtor in the property after the termination of the life estate, since the proceeding was one at law, and, even if such relief could be granted therein, the equities of the parties had not, in the nature of things, been properly set up or pleaded.

Kansas City, S. & M. R. Co. v. Weaver, 86 Mo. 473.

Mo. 1925. Sheriff's deed to property sold on execution against life tenant conveys only life estate.

Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.

Mo. 1937. Title to life estate in land by adverse possession *held* no defense to plaintiff's claim of title under sheriff's execution deed in action for determination of title to land and partition thereof; such deed, if valid, conveying whatever title defendant had to plaintiff.

Thorp v. Daniel, 99 S.W.2d 42, 339 Mo. 763.

Mo. 1949. A contingent remainder in land may be sold under execution, and, where such a sale is made and contingency later happens, title vests in fee in execution purchaser.

Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W.2d 714.

⇐266. — Time as of which title vests in purchaser.

Mo. 1884. An execution sale transfers the title of the judgment creditor as of the beginning of the judgment lien, and vests the purchaser with a title superior to one derived from a subsequent mortgage lien, and the purchaser's lien is not impaired by recitals in the sheriff's deed of previous executions issued on the judgment, and that "by virtue of said levies and the statute in such case made and provided I, as sheriff as aforesaid, did relevy said last-named execution," as such recitals will not restrict the lien to the lien of the last execution.

Bush v. White, 85 Mo. 339.

Mo. 1890. Under Rev.St.1835, p. 339, § 3, which provided that the lien of a judgment should begin when it was rendered, it was not within the power of the sheriff making a sale to limit the meaning of his general transfer of title by a recital in the deed that the interest conveyed dated from a subsequent day.

Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.St.Rep. 618.

Mo.App. 1903. The lien of an attachment dates from the date of the levy, and, when matured by judgment, execution, and sale thereunder, relates back to the date of

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the levy, and passes title as of that date, free from subsequent incumbrances.

Pepperdin v. Bank of Seymour, 73 S.W. 890, 100 Mo.App. 387.

⇐267. Rights passing as incidents.

For cases from other jurisdictions, see other Key Number Digests.

⇐268. Liens or incumbrances on property.

Mo. 1835. A., who held a title bond for land, on payment of the purchase money, conveyed to B., who took possession. *Held* that, on a sale of the land on execution against A. and payment by the purchaser at the sheriff's sale of the purchase money, the lien was discharged, and B. was entitled to it in law and equity.

Bartlett v. Glascock, 4 Mo. 62.

Mo. 1855. By virtue of an execution from a state court, land then subject to the lien of a judgment of the United States circuit court was sold to A. After the lien of the latter judgment expired, execution thereon issued, by virtue of which the same land was sold to B. *Held*, that A. was entitled to the land.

Chouteau v. Nuckolls, 20 Mo. 442.

Mo. 1863. One who purchased at an execution sale on a junior judgment against a corporation acquired no title to the land, as against one who had a prior vendor's lien on the premises, though a judgment had been confessed by the corporation's president in favor of the lien holder, which was void.

McMurray v. St. Louis Oil Mfg. Co., 33 Mo. 377.

Mo. 1868. A purchaser under a judgment against the mortgagor after the execution of the mortgage acquires nothing more than the equity of redemption.

Hubble v. Vaughan, 42 Mo. 138.

Mo. 1875. Under a judgment and execution in an action by a county on the bond of J. given for the purchase price of county school lands, ordering a sale to foreclose J.'s equity of redemption, the sheriff's deed to C., the purchaser, conveyed merely "the right, title, and interest of J." Prior to the judgment, J. had given a trust deed, whereunder the lands were afterwards sold to L. *Held*, that C. got nothing but the title of J., which was lost by the sale to L.

Lewis v. Chapman, 59 Mo. 371.

Mo. 1877. Where the owner of a junior judgment caused land to be sold thereunder, the fact that he also owned a senior judgment, and that he stated at the sale that the purchaser of the land would take it incumbered with the lien of the senior judgment, was not fraud, as thereby tending to deter bidders, inasmuch as his statement was a statement of the law.

Hardwick v. Jones, 65 Mo. 54.

Mo. 1894. Where land in the wife's name, but belonging to the husband, is sold on execution against him, the purchaser obtains all his interest, burdened with the cloud caused by the wife's fraudulent title, and not merely the right to have his debt, etc., satisfied out of the land.

Garrett v. Wagner, 28 S.W. 762, 125 Mo. 450, overruling Woodard v. Martin, 17 S.W. 308, 106 Mo. 324.

Mo. 1899. Where a sheriff attaches and sells in compliance with Rev.St.1889, § 543, V.A.M.S. § 521.170, all the right, title, and interest of the defendant in land, the purchaser gets all the interest of the defendant, and the statement in the notice of sale that same was made subject to all prior liens and judgments will not affect the purchaser's right to contest the validity of a trust deed on the property.

Huffman v. Nixon, 53 S.W. 1078, 152 Mo. 303, 75 Am.St.Rep. 454.

Mo. 1931. Interest acquired by purchaser at execution sale *held* subject to prior judgment liens, of which he had constructive notice.

Hunter v. Hunter, 39 S.W.2d 359, 327 Mo. 817.

Mo. 1949. Where owner of realty executed trust deed and notes without consideration for accommodation of one who was indebted to bank, and who used trust deed and notes in securing his indebtedness to bank, and execution purchaser purchased realty at execution sale with knowledge of trust deed, and thereafter bank's debtor paid certain sum to bank and bank released trust deed and notes to debtor, execution purchaser, then had fee title to realty including any title of a reversionary interest not vested elsewhere, and trust deed was wiped out as an effective instrument.

Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W. 2d 714.

Mo.App. 1885. A purchaser of property at an execution sale is not entitled to priority over a mechanic who placed improvements on the property merely because the contract for the improvements was not in writing and the purchaser at the execution sale had no record notice thereof.

Page v. Bettes, 17 Mo.App. 366.

Mo.App. 1896. Where one buys at execution sale land which has charged on it a mort-

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gage which is prior to the judgment under which the execution is issued, he only purchases the equity of redemption, and takes the land subject to the mortgage.

Parkey v. Veatch, 68 Mo.App. 67.

One who purchased at an execution sale a portion of land covered by a trust deed securing a note, and subsequently purchased the note and deed, cannot foreclose the trust deed and sell only the portion remaining in the hands of the original owner.

Parkey v. Veatch, 68 Mo.App. 67.

Mo.App. 1901. Where an insolvent debtor has mortgaged his stock in trade to secure one of his creditors, the other of the remaining creditors may sell the mortgaged goods on their executions subject to the mortgage, and the purchasers at such sale may redeem from the lien of the mortgage.

State ex rel. Fields v. Cryts, 87 Mo.App. 440.

⇐269. Equities against debtor.

Mo. 1949. The real equities, and not paper equities, existent at time of execution sale, are controlling in determining interest acquired by execution purchaser.

Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W.2d 714.

⇐270. Bona fide purchasers.

⇐271. —— In general.

Mo. 1846. A sale under a satisfied judgment is void only against a purchaser with notice.

Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336.

Mo. 1846. The rule of caveat emptor applies to purchasers at sheriffs' sales on execution.

Hensley v. Baker, 10 Mo. 157.

Mo. 1848. The title of a bona fide purchaser at a sheriff's sale cannot be declared void in ejectment on account of any error or irregularity in the judgment or execution.

Landes v. Perkins, 12 Mo. 238.

Mo. 1852. A sale to a bona fide purchaser is not vitiated by the omission of the sheriff to advertise the sale according to law.

Draper v. Bryson, 17 Mo. 71, 57 Am.Dec. 257.

Mo. 1856. If a purchaser of land at a sheriff's sale is ignorant of a mistake in the deed by which it was conveyed to the debtor, he will not be bound by the equity of the vendor to have the mistake corrected.

Harrison v. Cachelin, 23 Mo. 117.

Mo. 1863. The purchaser of property at an execution sale need look no further than to the validity of the execution and sale, and his title is not affected by the insufficiency of the notice of the sale required by law.

Hendrickson v. St. Louis & I. M. R. Co., 34 Mo. 188, 84 Am.Dec. 76.

Mo. 1871. When it appears on the face of a sheriff's deed for land, or is shown by proof aliunde, that certain of the premises were sold by virtue of one or more executions, after such executions were satisfied by the sale of other property the deed, as to the premises so subsequently sold, is void and inoperative.

Durette v. Briggs, 47 Mo. 356.

Mo. 1871. Where a purchaser at execution sale went into immediate possession of the premises with the knowledge of a third party who afterwards learned that the title was defective by reason of defects in the sale, a subsequent purchase of the property by the third party under another judgment for a nominal sum was not a purchase in good faith, and he was not protected from the operation of the second and amended sheriff's deed to the original purchaser.

Thornton v. Miskimmon, 48 Mo. 219.

Mo. 1875. Satisfaction of a judgment prior to an execution sale of realty thereunder will render such sale void, and the purchaser will take no title thereunder, although he bought in good faith, and without notice.

McClure v. Logan, 59 Mo. 234.

Mo. 1875. Irregularities in the judgment and execution under which land is sold cannot affect the title of one who is a stranger to the proceedings, and has no notice of the irregularities at the time of his purchase.

Whitman v. Taylor, 60 Mo. 127.

Mo. 1875. All rights which have been acquired bona fide by any third person under an execution issued under a judgment, when the execution has not been impugned as improper or invalid, will be respected and preserved.

Jones v. Hart, 60 Mo. 362.

Mo. 1875. The payment of costs of an execution sale by plaintiff in the execution, or by his attorney, is not sufficient to constitute him a bona fide purchaser.

Christian v. Newberry, 61 Mo. 446.

Mo. 1883. A purchaser at execution sale is a purchaser from the judgment debtor, within the meaning of the recording act, and will take the title as against an unrecorded conveyance from the judgment debtor to a third person of which he has no notice.

Vance v. Corrigan, 78 Mo. 94.

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Mo. 1902. A purchaser at an execution sale has a superior title to the heirs of a grantee who claim under a prior unrecorded deed.

Wilson v. Jackson, 66 S.W. 972, 167 Mo. 135.

Mo. 1933. Rule of caveat emptor applies to every purchaser at sale under general execution, and execution creditor's equities are not transmitted to purchaser.

Hamlin v. Hawkins, 61 S.W.2d 348, 332 Mo. 1098.

Mo. 1949. The maxim caveat emptor applies to execution sales.

Munday v. Austin, 218 S.W.2d 624, 358 Mo. 959, appeal transferred 210 S.W. 2d 714.

Mo.App. 1910. In absence of fraud, surprise, or misunderstanding, the purchaser at an execution sale takes the title sold at his peril.

Clarke v. Cooper, 128 S.W. 47, 148 Mo. App. 230.

Mo.App. 1949. As between sheriff holding sale under execution and bidder at such sale, rule of caveat emptor applies in the absence of any fraud on the part of the sheriff, and sale will not be set aside because of failure of consideration.

Minto v. Minto, 217 S.W.2d 729, 240 Mo. App. 107.

⚖272. —— Notice.

⚖272 (1). In general.

Mo. 1844. A purchaser of land at a sale on execution is not affected by actual notice of an unrecorded deed of the same land, made by the execution debtor prior to the attachment. If the attachment was made without notice to the creditor, the purchaser will take a valid title as against the grantee in the unrecorded deed. Rev.St.1835, tit. "Conveyances," p. 123, §§ 31, 32.

Hill v. Paul, 8 Mo. 479.

Mo. 1873. The judgment, execution, levy, and sheriff's deed need only be looked to by the purchaser at a sheriff's sale.

Lenox v. Clarke, 52 Mo. 115.

Mo. 1878. Where the vitality of a judgment was suspended by a compromise, a sale under an execution based on such judgment carried no title to one who had notice of the compromise.

Nesbit v. Neill, 67 Mo. 275.

Mo. 1885. In ejectment, it appeared that plaintiff claimed under a judgment fraudulently obtained in violation of an agreement by which the suit was settled; that his assignor purchased on the day that the judgment was being attacked for fraud; that the contest came up in the courtroom just before the sale on papers of record in the case; that the parties interested in the judgment as of record took open and public action after voluntary appearance by them; that such assignor admitted he saw the attorney who resisted the motion, and met him several times in the forenoon before the sale took place; and that he might have been in the courtroom, but did not hear the arguments on the motion. The land was worth $700 or $800, and was being sold for $73. *Held*, that such assignor had notice of the invalidity of the judgment.

Murphy v. Smith, 86 Mo. 333.

Mo. 1886. A husband allowed his wife to retain possession and control of money she had at her marriage, and subsequently earned. Land was bought in 1859, and paid for with the money, the title being taken to the husband without her knowledge. On discovering this some years later she asked him to convey in trust for her, which he did in 1870, but the trustee lost the deed without recording it. Afterwards the husband signed a note as surety, but before it was put in judgment he made a second conveyance in trust for his wife, which was at once recorded. He told the creditor when he signed the note that he was without property. The latter examined the record, but made no further inquiry. It was generally understood that the land was the wife's. It was levied on, but at the sale the creditor, finding that she threatened a lawsuit, declined to bid. Thereupon, his attorney offered to buy the land, and pay the debt if the sale was sustained. The creditor assented, and the attorney bid in the land for $50. It was worth several thousand. *Held*, that the creditor and the attorney were charged with notice of the wife's claim under the unrecorded deed.

Kinealy v. Macklin, 14 S.W. 507, 89 Mo. 433.

Mo. 1894. Where the purchaser at the execution sale following a judgment rendered in a proceeding to collect back taxes was the attorney for the plaintiff therein, he is chargeable with notice of all irregularities in such proceeding.

Harness v. Cravens, 28 S.W. 971, 126 Mo. 233.

Mo. 1906. Proof that one who, on search of the records, discovered title to a certain property to be in a judgment debtor, went to the creditor, and, after urging, secured an execution sale of the property at which he became the purchaser, does not show knowledge of the false return of the sheriff or of a

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failure of service invalidating the judgment.
Heffernan v. Ragsdale, 97 S.W. 890, 199 Mo. 375.

Mo. 1913. A purchaser at an execution sale, with notice of a pending suit by a beneficiary in a deed of trust, executed by the execution debtor to secure a debt for the reformation of the deed so as to correctly describe the land intended to be conveyed takes with notice, and he cannot affect the beneficiary's right to reformation.
Wolz v. Venard, 161 S.W. 760, 253 Mo. 67.

Mo. 1921. Where son's bona fide deed to father was withheld from record until after rendition of judgment against son without father having agreed with son as to the withholding thereof, and without knowledge on part of father that son was obtaining credit on the strength of his ownership of the land, but where deed was recorded prior to execution sale, the father's title was superior to that of the execution sale purchaser.
Houston v. Sparks, 230 S.W. 70.

Mo. 1941. The purchaser at execution sale is charged with notice of the title he is getting.
Troost Ave. Cemetery Co. v. Kansas City, 154 S.W.2d 90, 348 Mo. 561.

⇐272 (2). Possession as notice.

Mo. 1923. Where the owner of land and his family were residing on their property, a purchaser at a sheriff's sale purchased with full notice of the owner's rights, and was not a bona fide purchaser, and did not come within the protection of equity or the law relating to bona fide purchasers of real estate, nor within the protection afforded innocent purchasers by Rev.St.1919, § 1539, V.A.M.S. § 511.240, relating to petitions for review.
Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

Mo.App. 1903. Where swamp lands were conveyed by a county, to which they were patented by the state, by mesne conveyances to plaintiff, and plaintiff had been in actual possession of a part of the land by a tenant claiming title to the whole, her title thereby acquired was superior to a title acquired by virtue of an execution sale of the land on a judgment against the county, after the county had parted with its title.
Houck v. Patty, 73 S.W. 389, 100 Mo. App. 302.

⇐272 (3). Liens, incumbrances, and equities.

Mo. 1871. A judgment creditor, which issued execution, and bought in at its own sale the debtor's realty, after its agent was put on inquiry as to whether an existing deed of trust made by the debtor describing lots in the adjacent block, and owned by a stranger, was not intended to cover the lots levied on, is junior to the equitable lien of the creditor under the trust deed.
Rhodes v. Outcalt, 48 Mo. 367.

Mo. 1875. A firm purchased land, but it was conveyed to one of the partners. An individual creditor of this partner obtained a judgment against him and purchased the land at an execution sale. He had notice before the purchase that the property was firm property, though he had no such notice at the time he recovered the judgment. *Held*, that the creditor was not a bona fide purchaser for value, and acquired only the interest the partner had in the property at the time of the sale, subject to the payment of the partnership debts.
Crow v. Drace, 61 Mo. 225.

Mo. 1912. Where land is conveyed to an innocent purchaser prior to the lien of the judgment of a creditor of the grantee, it defeats the title acquired under the execution on the judgment if the purchaser on execution knows that title has passed.
Tate v. Sanders, 149 S.W. 485, 245 Mo. 186, Ann.Cas.1914A, 998.

An execution purchaser of land with knowledge of outstanding equities takes subject thereto.
Tate v. Sanders, 149 S.W. 485, 245 Mo. 186, Ann.Cas.1914A, 998.

⇐273. —— Judgment creditor as purchaser.

Mo. 1864. Where an execution issued to the sheriff has been amended or altered at the request of the plaintiff, and he becomes the purchaser at the execution sale, the sheriff's deed to him will not pass title, since the alteration of the writ makes it invalid to purchasers with notice.
Trigg v. Ross, 35 Mo. 165.

Mo. 1872. Though an innocent purchaser at an execution sale cannot be affected by a sheriff's neglect to advertise land in the manner required, such neglect, coupled with gross inadequacy of price, will invalidate a purchase by the execution creditor.
Curd v. Lackland, 49 Mo. 451.

Mo. 1902. A landowner conveyed to another, who conveyed to the owner's wife and children, but the deeds were not recorded, and the land was sold under attachment against the owner by a subsequent creditor, who purchased at the sale, the amount of his bid, less costs, being credited on the execution. *Held*, that a contention that the pur-

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chaser, having given no new consideration, was charged with notice of all infirmities, and that the deed of the owner was good as against him, was of no avail, the deeds not having been given in good faith.

Rouse v. Caton, 67 S.W. 578, 168 Mo. 288, 90 Am.St.Rep. 456.

⇐274. —— Determination of question of bona fides.

Mo. 1916. Evidence *held* to show that defendant had purchased land in controversy and that purchaser at execution sale bought with full notice of defendant's equities.

Givens v. Burton, 183 S.W. 617.

⇐275. Effect of defects or irregularities in execution, levy or sale.

⇐275(1). In general.

Mo. 1878. A sale under an execution on a satisfied judgment carries no title to a purchaser with notice.

Nesbit v. Neill, 67 Mo. 275.

Mo. 1879. In the absence of fraud or oppression in the issuance of an execution by the equitable assignee of the judgment, the title of the purchaser is not affected by the fact that the assignment of the judgment was not sufficient in law.

Emory v. Joice, 70 Mo. 537.

⇐275(2). Judgment or execution.

Mo. 1843. Since a defendant who has notice of a suit against him is bound by the judgment rendered against him, however irregular or erroneous the proceedings, a purchaser at a sale on execution issued on such judgment will be protected.

McNair v. Biddle, 8 Mo. 257.

Mo. 1852. A purchaser at a sheriff's sale is not affected by any error or irregularity in the judgment or other proceedings prior to the sale, unless they are of such a character as to render the whole proceeding a nullity.

Draper v. Bryson, 17 Mo. 71, 57 Am.Dec. 257.

Mo. 1871. Where an execution in the form of an ordinary venditioni exponas was issued, reciting former levies and ordering the sale of what had been levied on, but leaving out entirely the command to levy on additional property, as required by Sess.Acts 1863, p. 20, § 1, sale thereunder of additional property not before levied on would convey no title.

Maupin v. Emmons, 47 Mo. 304.

Mo. 1873. Under St.1855, p. 741, § 20, and Id. p. 905, § 18, the title of a purchaser at execution sale will not be defeated because one of the execution defendants died after the judgment was entered, but before the execution was issued; it appearing that the property levied on and sold was that of a survivor. Though the execution was irregular, it was not void.

Hardin v. McCanse, 53 Mo. 255.

Mo. 1880. It is immaterial whether the proceedings in connection with execution sales were regular or not, since, if the judgments were erroneous, the circuit court had jurisdiction of the parties, and of the subject-matter, and the title of the purchaser is not to be affected by these irregularities; the judgment being good against a collateral attack.

Dunn v. Miller, 8 Mo.App. 467, reversed 75 Mo. 200.

Mo. 1887. A writ and order of publication notifying a nonresident thereof, having been issued against certain lands belonging to him, be made default, and general execution was issued, under which the sheriff levied on the attached lands and sold them. *Held*, that while there should have been a judgment to be levied on the attached property, and a special execution issued thereon, yet, as the property levied on and sold was only that actually seized by the attachment, the deed given by the sheriff would be upheld, in ejectment against the purchaser by one claiming under the debtor.

Burnett v. McCluey, 4 S.W. 694, 92 Mo. 230.

Mo. 1898. The purchaser of land at a sheriff's sale in execution of a judgment, the lien of which had expired, acquires nothing thereby.

Benoist v. Rothschild, 46 S.W. 1081, 145 Mo. 399.

Mo. 1913. A sale under an execution not issued by the clerk of the circuit court of the county rendering the judgment, as required by Rev.St.1909, § 2166, V.A.M.S. § 511.480, but issued from the office of the clerk of the circuit court of another county, conveys no title.

Wolz v. Venard, 161 S.W. 760, 253 Mo. 67.

Mo. 1914. Despite the liberal provisions of the statute of jeofails and amendments, an execution sale of land cannot be sustained, where the writ of execution did not direct the sheriff to levy upon land.

Keeline v. Sealy, 164 S.W. 556, 255 Mo. 692.

Mo. 1919. Sale under execution on void judgment vests the purchaser with no title.

Graves v. Smith, 213 S.W. 128, 278 Mo. 592.

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Mo. 1921. Where a judgment was not void, but simply erroneous, the title of a stranger to the proceeding purchasing land sold under execution on the judgment was good.

Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.

Mo. 1931. Where execution issued was nullity, sheriff's deed thereunder was also nullity.

Mahen v. Tavern Rock, 37 S.W.2d 562.

Mo.App. 1911. Where a sale under an execution is relied on as a source of title, the claimant must show a valid judgment as well as a valid execution.

Gregmoore Orchard Co. v. Gilmour, 140 S.W. 763, 159 Mo.App. 204.

⇐275 (3). Levy or sale.

Mo. 1827. A sale made by a sheriff of a chattel conveys a good title to the purchaser, unless there was fraud, and the purchaser participates in it. Although the property is not present at the time of the sale, a good title is acquired.

Kean v. Newell, 1 Mo. 754, 14 Am.Dec. 321.

Mo. 1849. Where a sheriff fraudulently colluded with a third party, and sold goods held under execution on the day after the day advertised for sale, the purchaser acquired no title.

Teubner v. Moller, 12 Mo. 528.

Mo. 1870. When a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an undervalue, the title he obtains is void and utterly worthless.

Turner v. Adams, 46 Mo. 95.

Mo. 1877. One of several heirs bought out the interests of the others in certain land, but by mistake their deed to him described the wrong section. Such grantee conveyed to L. by the same mistaken description. Defendant purchased the land on execution sale based on a judgment against L. in his favor, and he went into possession and paid taxes for several years. Thereafter plaintiff, another creditor of L., purchased the land under an execution in his favor against L., and subsequently defendant, with knowledge of the other execution, procured a quitclaim deed conveying by a correct description from the heirs. The levy made under the first execution was invalid, because made after the return date of the writ. *Held*, that plaintiff was entitled to a decree vesting in him the title acquired by defendant, and without making compensation for the money paid on his purchase or the taxes.

Davison v. Robertson, 67 Mo. 208.

Mo. 1887. Gen.St.1865, p. 541, § 44, provides that, where the time of holding the terms of court shall be changed, all sales of property which would have been made at terms previously established shall be made at the first term of the court to be held in pursuance of such change, and that, where such sales have been advertised to be made on any day of such previously established term under execution, the sale shall be made on the same day of the term held in pursuance of such change, but the sheriff shall put up at the front door of the court house of the proper county, before the first day of the changed term, a list of the property to be sold, specifying the names of the parties, the day of sale, and stating that such property had been previously advertised. *Held* that, if the sheriff's deed under such a sale failed to state that the notice of sale was put up "at the front door of the court house," such omission, being a ministerial act, could not affect the title of an innocent purchaser without notice in a collateral proceeding.

Evans v. Robberson, 4 S.W. 941, 92 Mo. 192, 1 Am.St.Rep. 701.

Mo. 1891. Where plaintiff was the owner of three judgments by assignment on which executions were issued, but two of them were quashed, and the land sold under the third, and purchased by the debtor's father, the fact that the debtor's father was in court when the two executions were quashed, and said before the sale that he would make the land bring the amount of the debts, was not sufficient evidence of fraud to entitle the plaintiff to maintain a bill in equity to have a part of the land set off to him.

Hartle v. Peterman, 17 S.W. 894, 107 Mo. 355.

Mo. 1891. Though the fact that a sheriff sold an entire addition in a lump may have been good ground for setting aside the sale, had timely proceedings been begun, the sale was not void.

Hays v. Perkins, 18 S.W. 1127, 109 Mo. 102.

Mo. 1902. Where judgment for $6,000 was paid, except costs of less than $100 and execution for the full amount was then taken out by an attorney of the judgment plaintiff, and property of one of the judgment defendants, on which was a trust deed, was sold thereunder, said attorney bidding it in, and the sheriff making the deed to the other defendant, the writ was invalid, and would not

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support the deed, said plaintiff, attorney, and defendant knowing the facts.

Baird v. Given, 70 S.W. 697, 170 Mo. 302.

Mo. 1907. A levy and sale of a defendant's interest in land is not rendered void by failure to notify him of his right to select exempt property, whatever right of action he may have for injury incurred thereby.

Hudson v. Wright, 103 S.W. 8, 204 Mo. 412.

Mo. 1910. The failure to give an execution defendant notice of sale, as required by Gen.St.1865, c. 160, § 43, is a mere irregularity not affecting the validity of the sale.

Norman v. Eastburn, 130 S.W. 276, 230 Mo. 168.

Where sheriff's deed under special execution was regular and valid on its face, the notice of sale, if defective, makes the deed merely voidable and not void.

Mo. 1919. Ammerman v. Linton, 214 S. W. 170, 279 Mo. 439.

Mo. 1919. Ammerman v. Linton, 214 S. W. 174.

Mo. 1932. Where irregularities in proceedings leading to sale on execution, render sale voidable rather than void, bona fide purchaser acquires good title.

Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

Title of purchaser at execution sale is not affected by irregularities in proceedings leading to sale unless irregularities render execution void.

Wamsley v. Snow, 53 S.W.2d 258, 331 Mo. 261.

Mo.App. 1887. Where the constable levying an execution and making sale thereunder was neither an officer de jure nor de facto, the sale was invalid, and the purchaser acquired no title to the property.

Jester v. Spurgeon, 27 Mo.App. 477.

Mo.App. 1914. The rule of caveat emptor, applicable to execution sales provided no fraud is practiced, does not apply where the sale is void, because of the death of the execution creditor and a purchaser, acting under the mistaken belief of law that the sale is valid, may be relieved from his purchase by application to the court rendering the judgment and issuing the execution.

Chilton v. Harris, 166 S.W. 1084, 179 Mo. App. 267.

⇐276. Effect of modification, vacation, or reversal of judgment.

⇐276(1). Vacation, modification, or amendment.

Mo. 1889. The fact that a judgment was vacated by the trial court on motion at a subsequent term does not affect the rights of a purchaser without notice of irregularities at a sale under an execution on the judgment, where the latter is not wholly void.

Schmidt v. Neimeyer, 13 S.W. 405, 100 Mo. 207.

Mo. 1891. Plaintiff, being owner by assignment of three judgments of the same date, caused executions to be issued thereon and levied upon lands of the debtor. Two of such executions were quashed on motion, and the sale proceeded upon the remaining execution and executions on later judgments of others. Plaintiff's attorney represented that the title would be perfect under such sale, and the lands were purchased by the debtor's father. Subsequently the orders quashing the two executions were set aside on appeal, and the lands were sold thereunder, and purchased by plaintiff. *Held*, that the first purchaser took the title free from the liens of the other judgments of plaintiff.

Hartle v. Peterman, 17 S.W. 894, 107 Mo. 355.

Mo. 1906. A judgment forming the basis of an execution sale of realty showed on its face a valid service, as did also the return of the officer. A year after the sale, without knowledge of the purchaser, the judgment was vacated on the grounds of defective service. *Held* not to affect the purchaser's rights in the property.

Heffernan v. Ragsdale, 97 S.W. 890, 199 Mo. 375.

Mo.App. 1911. The vacation of a judgment, on motion at a subsequent term, does not affect a purchaser, without notice of irregularities at a sale under an execution of the judgment, where the latter is not wholly void.

Brown v. Curtiss, 137 S.W. 24, 155 Mo. App. 376.

⇐276(2). Reversal.

Mo. 1860. A subsequent reversal of a judgment under which an execution sale was had does not devest the title of the execution purchaser, unless he is plaintiff in execution.

Shields v. Powers, 29 Mo. 315.

A sale to an execution plaintiff will be rendered invalid by the reversal of the judgment, as respects the costs of the suit.

Mo. 1867. Gott v. Powell, 41 Mo. 416.

Mo. 1874. Vogler v. Montgomery, 54 Mo. 577.

Mo. 1874. Holland v. Adair, 55 Mo. 40.

Mo. 1874. The title of a stranger who purchases in good faith from a plaintiff in a judgment who purchased at the execution

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sale will not be forfeited by a subsequent reversal of the cause.

Vogler v. Montgomery, 54 Mo. 577.

Mo. 1885. A special execution was issued and lands sold to satisfy a judgment enforcing a vendor's lien, and afterwards the judgment was reversed on appeal, whereupon the defendants in the execution brought an action against the execution plaintiffs to recover from them the amount so received at the execution sale and for damages sustained. A prior mortgagee became a purchaser and received a sheriff's deed, and on the same day received a quitclaim deed from the execution defendants. *Held*, that the title to the land passed by the execution sale and the sheriff's deed thereunder, and that the quitclaim deed, being subordinate to the sheriff's deed, was inoperative and passed no title, and was therefore void, and plaintiffs in the execution cannot be heard to say that such defendants had no interest or title to the land thus sold.

Griffith v. Randolph, 87 Mo. 260.

Where husband defaulted in mortgage foreclosure suit against husband and wife, and appeal from judgment for plaintiff was taken only as to wife's interest there was a subsisting judgment as to husband at date of special execution, and sale thereunder, though wife's appeal as to her interest was pending and judgment as to wife was subsequently reversed.

Mo. 1919. Ammerman v. Linton, 214 S. W. 170, 279 Mo. 439.

Mo. 1919. Ammerman v. Linton, 214 S. W. 174.

Mo. 1921. Where there was no supersedeas staying execution of a judgment, its subsequent reversal in no way impaired the title of one purchasing at sale under execution.

Sidwell v. Kaster, 232 S.W. 1005, 289 Mo. 174.

Mo.App. 1907. Where there is no supersedeas, and an execution sale takes place, and a stranger becomes the purchaser, his title is good, though the judgment be afterwards reversed; but such is not the case where plaintiff in the action purchases.

Wood v. Ogden, 101 S.W. 615, 124 Mo. App. 42.

⇐277. Possession.

⇐278. —— In general.

Mo. 1875. A judgment against one in possession of land is a lien upon whatever interest he has in the land, and a sale under execution would transfer the possession or the right of possession to the purchaser.

Matney v. Graham, 59 Mo. 190.

⇐279. —— During period for redemption.

For cases from other jurisdictions, see other Key Number Digests.

⇐280. —— Remedies for recovery.

⇐280(1). In general.

Mo. 1875. A purchaser at an execution sale may recover in ejectment against a defendant in execution who holds merely by virtue of an after-acquired possession.

Matney v. Graham, 59 Mo. 190.

Mo. 1898. A purchaser, at a sale on execution against a husband, of land standing in the name of the wife, obtains no title which he can enforce in ejectment, though the conveyance to the wife was made to defraud the creditors of the debtor.

Kingman v. Sievers, 45 S.W. 266, 143 Mo. 519.

Mo. 1899. A person claiming as purchaser at an execution sale of an undivided half of land, which was claimed to have been conveyed by the debtor in fraud of creditors, must have the fraudulent conveyance set aside before he can recover in ejectment.

Perkins v. Meighan, 49 S.W. 498, 147 Mo. 617, 71 Am.St.Rep. 586.

Mo. 1899. Conceding that it is a good defense in ejectment by a judgment creditor claiming land by a sale under his judgment, that the land was bought with money belonging to the judgment debtor's mother, and that, although conveyed to hinder his creditors, it was conveyed to defendants, who were her heirs, a mere "claim" that such were the facts in relation to the purchase of the land by the judgment debtor would constitute no defense.

Johnson v. Bowlware, 51 S.W. 109, 149 Mo. 451.

Mo. 1904. A defendant in an execution cannot defend an action of ejectment brought against him by a purchaser at the execution sale by setting up an outstanding title consisting of a prior deed of trust after forfeiture; nor can the holder of such outstanding title claim the benefit thereof, where he has acquired possession under the defendant in the execution, since the purchaser at the execution sale acquires all the debtor's legal rights, which includes his possession, as well as the possession of all others entering under him.

Littlefield v. Ramsey, 80 S.W. 949, 181 Mo. 613.

Mo. 1912. If a sheriff's deed on an execution sale is so defective that it only conveys an equitable title, it will not sustain a recovery in ejectment; the holder's remedy

being to have the deed corrected according to statute.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

⇐280 (2). Pleading and proof.

Mo. 1898. Where plaintiff in ejectment claims under an execution sale, but fails to show that the execution debtor ever owned the land, he cannot recover.

Adams v. Yates, 45 S.W. 304, 143 Mo. 475.

Mo. 1905. Where, in ejectment, plaintiffs claimed under an execution sale, and under the issues tendered by defendants, and conceded by plaintiffs the judgment under which the execution issued was alleged to be final judgment, it was incompetent for defendants to contradict them.

Kessner v. Phillips, 88 S.W. 66, 189 Mo. 515, 107 Am.St.Rep. 368.

⇐280 (3). Trial or hearing and relief.

For cases from other jurisdictions, see other Key Number Digests.

⇐281. Rents and profits.

Mo. 1852. A purchaser at an execution sale, of a lessee's estate and interest in the demised premises, is liable to the lessor for the after-accruing rent, whether he enter into possession or not.

Smith v. Brinker, 17 Mo. 148, 57 Am.Dec. 265.

Mo. 1912. A purchaser of real property under an execution sale is entitled to rents and profits only from the date of his title under a sheriff's deed.

Tate v. Sanders, 149 S.W. 485, 245 Mo. 186, Ann.Cas.1914A, 998.

Mo.App. 1902. Where, prior to the sale of land under execution, the judgment debtor rented the same for cash rent to defendant, who took possession and planted crops, which were growing on the land at the time of the sale, defendant was entitled to the crops on maturity, as against the purchaser at the execution sale.

Johnson v. Cook, 70 S.W. 526, 96 Mo.App. 442.

⇐282. Waste.

For cases from other jurisdictions, see other Key Number Digests.

⇐283. Actions to confirm or try title.

Mo. 1883. Rev.St.1879, §§ 2762–2765, authorizing the assignment of judgments, and giving the assignee any right of action on the judgment which the assignor would have had, give the assignee of a judgment the right to take any proceedings under the execution issued on such judgment which the assignor might have taken; and, having purchased at the sale, he may sue to set aside a conveyance of the property by the judgment debtor prior to the sale.

Lionberger v. Baker, 14 Mo.App. 353, affirmed 88 Mo. 447.

Mo. 1938. In action to determine title to lots as between purchaser of sheriff's deed under execution and son of execution debtor, evidence warranted finding that execution debtor used $500 of son's money, at time when son was minor, in paying for or improving property, but required finding that no other definite substantial amount was furnished by son for making improvements or paying therefor.

Lifiander v. Bobbitt, 111 S.W.2d 72.

In action to determine title to lots as between purchaser of sheriff's deed under execution and son of execution debtor, where evidence showed that execution debtor invested $500 of son's money in lots at time when son was a minor, but no more, judgment was rendered declaring purchaser of sheriff's deed to be owner of lots subject to lien in favor of execution debtor's son for $500.

Lifiander v. Bobbitt, 111 S.W.2d 72.

⇐284. Rights and remedies on avoidance of sale or failure of title.

⇐285. —— In general.

Every one taking title under process of court takes subject to power of court to set aside proceeding for cause shown.

Mo. 1930. State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

Mo. 1930. State ex rel. Banner Loan Co. v. Landwehr, 27 S.W.2d 25, 324 Mo. 1142.

⇐286. —— Reimbursement.

Mo. 1870. The sheriff, under an execution against J. M., by mistake sold and deeded to F. M. land to which J. M. had no title. The purchase money was paid, and went to extinguish the judgment against J. M. F. M. surrendered the tract he supposed he had purchased to a third party, who took possession and made improvements. Afterwards, discovering the mistake, J. M. regained possession, claimed the land, and refused to refund the purchase money. *Held* that, the consideration for the money paid on execution having failed, F. M. had no title to the land, and he could maintain an action for the recovery of the purchase money.

McLean v. Martin, 45 Mo. 393.

Mo. 1871. A constable, having an execution, levied on goods belonging to the debt-

For references to other topics, see Descriptive-Word Index

or, which were being sold at auction. After a conference between the constable, the defendant, and the auctioneer, the auctioneer in the constable's presence announced that the matter had been adjusted; that he would proceed with the sale, and pay over to the constable sufficient of the proceeds to satisfy the execution. Accordingly the sale proceeded and plaintiff bought goods, for which he paid the auctioneer, and the auctioneer turned the money over to the constable. The constable then produced another execution, hitherto undisclosed, and levied upon the property bought by plaintiff, and carried it away. *Held*, that the constable had made the auctioneer his agent in making the sale, and that by subsequently taking possession of the property he disaffirmed the sale, and was bound to return the purchase money.

Thurley v. O'Connell, 48 Mo. 27.

Mo. 1880. The doctrine of caveat emptor has no application, where a mistake is made both by the sheriff and the purchaser in selling a tract of land to which defendant in the execution has no title; and as the consideration for the money paid on the execution has failed, and gone to extinguish the judgment against defendant in the execution, plaintiff is entitled to recover it back from defendant in the execution. This is true, where the mistake was not discovered until after the money was paid by the purchaser to the sheriff, who paid it over.

Wilchinsky v. Cavender, 72 Mo. 192.

⇐287. —— Recourse to parties or officer.

For cases from other jurisdictions, see other Key Number Digests.

⇐288. Liabilities of purchasers.

Mo.App. 1904. The fact that an execution defendant, in surrendering property subsequently sold as his, remained in possession as agent, so that there was no visible change of ownership, is immaterial on the question of conversion by the execution purchaser, where, before he purchased, he was notified by the actual owner of the property whose the property was.

Sperling v. Stubblefield, 79 S.W. 1172, 105 Mo.App. 489.

⇐289. Assignees of certificates of sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐290. Purchasers from execution purchasers.

Mo. 1866. The owner of personal property is not estopped from asserting his title to it, as against a vendee of one who purchased it at an invalid sale on execution, by his having pointed out the property to such vendee after he purchased it.

Newman v. Hook, 37 Mo. 207, 90 Am.Dec. 378.

Mo. 1872. The title derived from a purchase at a sale on execution is not invalidated by the fact that the purchaser at the sale was one of several mortgagees of the property, and that his purchase resulted in a trust in favor of his co-mortgagees, where the property has not been charged with the trust by proper proceedings. Such trust must be ascertained and declared in equity before it can attach.

Waddell v. Williams, 50 Mo. 216.

Mo. 1873. A voluntarily substituted purchaser at an execution sale has no cause of action against the original vendee for the amount of the purchase money paid over to him under a mutual mistake as to the identity of the estate sold.

Cravens v. Gordon, 53 Mo. 287.

Mo. 1929. Deed to bona fide vendee could not be set aside on mere constructive notice of inadequacy of price paid by execution purchaser.

Elliott v. McCormick, 19 S.W.2d 654, 323 Mo. 263.

Mo. 1945. A sheriff's sale of a married woman's homestead without personal notice to her, or any opportunity to claim her exemptions under statutes, was void, and no interest in the property was acquired by defendant under a deed from purchaser at execution sale. Mo.R.S.A. §§ 608, 609, 3385, V.A.M.S. §§ 451.290, 513.475, 513.480.

Hallauer v. Lackey, 188 S.W.2d 30, 353, Mo. 1244.

(C) REDEMPTION.

⇐291. Right to redeem in general.

For cases from other jurisdictions, see other Key Number Digests.

⇐292. Statutory provisions.

Mo. 1838. Whether St. 1821, allowing an execution creditor three years to redeem lands sold under an execution, is constitutional or not, the execution sale is valid, since only the right to redeem is lost if the act is unconstitutional.

Evans v. Wilder, 5 Mo. 313.

⇐293-294.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

For later cases see same Topic and Key Number in Pocket Parts

⚖295. Time of redemption.

Mo. 1879. An agreement by the purchaser at execution sale to hold the title as security, and to allow a reasonable time within which to redeem, does not entitle the debtor to wait for 10 years and 6 months within which to make tender of the amount.

Gillespie v. Stone, 70 Mo. 505.

⚖296-302.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

(D) CONVEYANCE TO PURCHASER.

⚖303. Necessity and nature in general.

Mo. 1843. The certificate given by the sheriff to a purchaser at a sheriff's sale under Act June 28, 1821, does not convey any title to the purchaser which will defeat an action of ejectment.

Evans v. Ashley, 8 Mo. 177.

Mo. 1857. Though, where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, which interest can be seized and sold on execution by a creditor, and a conveyance decreed to him in equity, a creditor purchasing at such sale must complete his purchase by taking a sheriff's deed before he can become entitled to such relief.

Dunnica v. Coy, 24 Mo. 167, 69 Am.Dec. 420.

Mo. 1888. The lapse of 14 years without a deed having been taken by the purchaser at a sheriff's sale authorizes the conclusion that he and those claiming under him had abandoned all claim to the premises.

Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.St.Rep. 307.

Mo. 1912. Rev.St.1909, § 2231, V.A.M.S. § 513.275, requiring the officer selling property to make to the purchaser a deed with certain recitals, is mandatory so that a sheriff's deed is essential to a transfer of land under an execution sale.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

⚖304. Statutory provisions.

Mo. 1826. The statute for the relief of debtors and creditors does not extend to creditors who became so after the act was repealed.

Ober v. St. Charles County Sheriff, 1 Mo. 502.

⚖305. Authority to make.

Mo. 1842. A purchaser under an execution, receiving a certificate of purchase under Act June 28, 1821, and desiring the successor in office of the sheriff executing the certificate to make a deed, should file a petition in the circuit court.

Evans v. Wilder, 7 Mo. 359.

Mo. 1843. Under the statute of June 28, 1821, the successor of a sheriff who has given a certificate of the purchase of land on execution cannot, after the repeal of the statute, give a deed of such land to the purchaser without an order of court for that purpose, made on application of the purchaser.

Evans v. Ashley, 8 Mo. 177.

Mo. 1872. Under Rev.Code 1855, p. 750, §§ 63, 64, a sheriff may, after expiration of his term of office, make a deed to land levied on by his predecessor; and he may do so without any order of court.

Porter v. Mariner, 50 Mo. 364.

Mo. 1879. Section 62 of the chapter on executions, providing that, when any officer shall die or become disqualified after the sale of any property and before executing any conveyance therefor, the purchaser may petition the court and upon proper showing the court shall order the sheriff then in office to execute and acknowledge a deed to the purchaser, was intended solely to provide an official grantor in lieu of the officer who made the sale; and when the sheriff is ordered by the court under this section to make a deed to the purchaser, such officer has just the same powers, and none other, as the sheriff who made the sale would have, had he not died or become disqualified.

In re Guenzler, 70 Mo. 39, affirming Hitchcock v. Clendennin, 6 Mo.App. 99.

Under Rev.St.1909, § 2237, V.A.M.S. § 513.325, providing that when any officer shall have levied upon any real estate, and the term of such officer has expired, before the purchaser has obtained a deed thereof, such officer shall have the power to execute a deed just as if his term had not expired, a sheriff may, after the term of his office has expired, execute a deed in lieu of an invalid one made to land sold under execution.

Mo. 1911. Butler v. Imhoff, 142 S.W. 287, 238 Mo. 584.

Mo. 1911. Barnes v. Imhoff, 142 S.W. 291, 238 Mo. 598.

Mo.App. 1934. Sheriff who made sale under execution had authority after expiration of term to make deed to purchaser at execution sale, and order directing his successor to make and deliver deed was improper.

Swabey v. Boyers, 71 S.W.2d 110.

For references to other topics, see Descriptive-Word Index

⇐306. Right to conveyance.

Mo. 1861. A. became the purchaser of land at a sheriff's sale, and paid the purchase money, but before the deed was executed he died. *Held*, that the deed should be made to the heirs of A.

Swink v. Thompson, 31 Mo. 336.

Mo. 1879. Where the purchaser at execution sale conveys the property before he receives a sheriff's deed, and his grantee in turn conveys it to others, the last grantees are not entitled to demand a conveyance from the sheriff.

In re Guenzler, 70 Mo. 39.

It seems that it would be a reasonable construction of the statute to permit the sheriff, the purchaser being dead, to execute a deed to his legal representatives, without naming them.

In re Guenzler, 70 Mo. 39.

Mo. 1888. In ejectment, defendant claimed under S., who had purchased at an attachment sale. Many years after the death of S., who had never received a deed from the sheriff for the land purchased by him at the sale, defendant instituted an ex parte proceeding against the sheriff, and without any notice to plaintiff, who claimed under an earlier conveyance, obtained an order directing the sheriff to execute a deed to defendant as assignee of S. *Held*, that the deed so executed was of no force whatever, as against plaintiff.

Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.St.Rep. 307.

Mo.App. 1934. Whether lost execution under which property was sold lacked clerk's signature and seal of court *held* question of fact for trial court's determination in proceedings to compel sheriff to deliver deed to purchaser at execution sale.

Swabey v. Boyers, 71 S.W.2d 110.

In proceedings to compel sheriff's issuance of deed to property sold under execution, evidence sustained finding that execution, since mislaid, contained signature of clerk and court's seal and was, therefore, not fatally defective.

Swabey v. Boyers, 71 S.W.2d 110.

⇐307-308.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐309. Form and contents

⇐310. —— In general.

Mo. 1873. A sheriff's deed on execution, which complies with Wag.St. p. 612, § 54, by giving the names of the parties to the execution, the date when issued, the date of judgment, the description of the property, and the time, place, and manner of sale, is sufficient.

Wilhite v. Wilhite, 53 Mo. 71.

⇐311. —— Recitals.

Mo. 1853. Rev.Code 1835, § 38, enacts that, when real estate is taken on execution, the officer making the sale shall expose the same at the court-house door on some day during the term of the circuit court, having previously given 20 days' notice of the time and place of sale. Section 45 provides that the officer shall make a deed to the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, the description of the property, and the time, place, and manner of sale. *Held*, that a sheriff's deed which recited that the land was exposed to sale "at the court-house door in the city of St. Louis, during the ——— term of the ——— court of ——— for the year eighteen hundred and forty ———," was void.

Tanner v. Stine, 18 Mo. 580, 59 Am.Dec. 320.

Mo. 1865. A sheriff's deed of real estate sold on execution is not invalid because it recites that the sheriff made the levy, when it appears that his predecessor indorsed the levy on the execution.

Hunter v. Miller, 36 Mo. 143.

Mo. 1868. A sheriff's deed, which recites the date of the rendition of a justice's judgment, its amount, the names of the parties to the record, the time of filing the transcript, and when execution issued, but not the name of the justice before whom the judgment was rendered, is nevertheless sufficiently definite to render it prima facie evidence, and shifts the burden of proof on the adverse party, who denies its validity.

Carpenter v. King, 42 Mo. 219, affirmed Perkins v. Quigley, 62 Mo. 498, and Corby v. Tracy, 62 Mo. 511.

Mo. 1870. A mistake of one day in recitals in the deed to the purchaser as to the sale of the land by the sheriff will not affect the validity of the deed, where it is on its face according to law, showing a sale at an authorized day during term of court.

Buchanan v. Tracy, 45 Mo. 437.

Mo. 1871. Under Gen.St.1865, c. 160, § 54 (Wag.St. p. 612), requiring a sheriff's deed to contain only such recitals as are "recited in the execution," a deed to the purchaser at attachment sale need state only the facts which the order of sale to the sheriff necessarily must; and, the date and description of the levy being not necessary to be stat-

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ed in the order to sell, their omission from the deed does not invalidate it for uncertainty.

Foulk v. Colburn, 48 Mo. 225.

A sheriff's deed is not vitiated by a failure to recite the original levy.

Foulk v. Colburn, 48 Mo. 225.

Mo. 1872. Where a sheriff's sale under an execution was not made at the return term because the court was not then in session, and the return of the execution did not show why the sale was not then made, the omission to recite the reason in the sheriff's deed did not render it void, since the court could permit the sheriff to amend the return.

Groner v. Smith, 49 Mo. 318.

Mo. 1872. Where land was sold under an execution issued by the circuit court on a transcript filed from the justice's court, it is not essential to the validity of the sheriff's deed that it show that the justice's execution was issued to a constable of the township where the execution defendant resided.

Waddell v. Williams, 50 Mo. 216.

Mo. 1873. A sheriff's deed is not invalid because it recites a judgment against "Smith and Haliburton," when the record in the cause shows a judgment against "Jacob Smith and Wesley Haliburton."

Union Bank v. McWharters, 52 Mo. 34.

Mo. 1873. A sheriff's deed set out certain judgments, and also set out certain executions, but failed to couple the executions with the judgments, but the names of the parties and the amounts as set out were identical. *Held*, that it was inferable that the executions were on those judgments, and that such omissions are not fatal to the deed, inasmuch as they could mislead no one.

Wack v. Stevenson, 54 Mo. 481.

Mo. 1874. Where, in ejectment by the grantee in a sheriff's deed, the evidence showed that judgment was rendered for "Maria H. Mather," a deed reciting the rendition of a judgment for "Maria Mathews" was inadmissible in evidence.

Robson v. Thomas, 55 Mo. 581.

Mo. 1874. A sheriff's deed, substantially complying with the statutory requirements, is not invalidated by ambiguous recitals which would not mislead, as, for instance, the consolidation of several judgments and executions into one, without clearly designating the respective parties.

Allen v. Sales, 56 Mo. 28.

Mo. 1874. Where a judgment was entered as in favor of A. simply, but the execution recited that it was in favor of A. as administrator, *held*, that the sheriff's deed was not invalidated by a like recital; the whole record showing the suit to be in A.'s administrative capacity.

Acock v. Stuart, 57 Mo. 150.

Mo. 1874. A sheriff's deed on execution to a bona fide purchaser at an adjourned sale *held* to be invalid for not reciting that a new notice was duly given.

Ladd v. Shipple, 57 Mo. 523.

Mo. 1876. A deed of a sheriff conveying land sold at an execution sale, which does not state that the land was sold at any term of the court, is void, and passes no title to the purchaser.

Martin v. Bonsack, 61 Mo. 556.

Mo. 1876. Under Wag.St. p. 612, § 54, and page 839, art. 7, § 14, a sheriff's deed, based on an execution issued on a transcript from a justice of the peace, is not void because it fails to recite that execution had been issued by the justice of the peace and returned nulla bona, since it will be presumed that the clerk of the circuit court performed his duty.

Perkins v. Quigley, 62 Mo. 498, affirming Carpenter v. King, 42 Mo. 219.

Mo. 1876. Recital in a sheriff's deed of a writ of attachment does not invalidate the proceedings, though by the appearance of defendant a personal judgment was entered against him.

Huxley v. Harrold, 62 Mo. 516.

Mo. 1880. Rev.St.1835, p. 259, § 45, requiring that sheriffs' deeds should recite the names of parties, date, date of judgment, particulars recited in the execution, description of property, and time, place, and manner of sale, does not apply to a sale made in 1833, and therefore apparently under Act 1825, Rev.St.1825, p. 369, § 20; the latter act requiring the deed of the sheriff to recite the execution, advertisement, purchase, and consideration.

Dunn v. Miller, 8 Mo.App. 467, reversed 75 Mo. 260.

Mo. 1882. A sheriff's deed at an execution sale recited the names of the parties to the execution as follows: It substituted in the deed the name of "Brockmeyer" for the name "Brookmire." *Held*, that the variance was not material and the deed was valid.

Davis v. Kline, 76 Mo. 310.

A sheriff's deed at an execution sale recited the dates of the judgments as recited in the execution, but the dates of the judgments as recited in the execution did not conform to the dates of the judgments.

For references to other topics, see Descriptive-Word Index

There was evidence showing that the execution was in fact issued on the judgments. The only mistake in the date as to the judgments was a mistake as to the year. *Held*, that the mistake was clearly a clerical misprision, which did not invalidate the deed.

Davis v. Kline, 76 Mo. 310.

Under Rev.St.1879, § 2392, in force since the Revision of 1835, requiring an officer selling real estate to make to the purchaser a deed reciting the names of the parties to the execution, the date when issued, the date of the judgment, and other particulars as recited in the execution, a sheriff's deed which conforms to the execution will pass title, though there is a variance between the execution and the judgment, where such variance only makes the execution erroneous, and not void.

Davis v. Kline, 76 Mo. 310.

Mo. 1884. Under Rev.St.1879, § 2392, providing that a sheriff's deed shall recite the names of the parties to the execution, a deed reciting the names of the parties to the judgment, its date and amount, and stating that execution was issued on said judgment, without again naming the parties, is sufficient.

Gaines v. Fender, 82 Mo. 497.

Mo. 1884. 1 Rev.St.1855, p. 746, § 45, requires that property sold on execution should be exposed for sale at the courthouse door. *Held*, that an execution deed reciting that the land was sold at the courthouse will not be considered invalid, after the possession of the property by the purchaser for over 15 years, as the recital that the sale was made at the courthouse may be construed as meaning that it was conducted at the lawful and customary place for such sales.

Bush v. White, 85 Mo. 339.

Mo. 1886. A sheriff's deed is not void because it fails to recite the exact day of a term of court at which the judgment or decree was rendered.

Lewis v. Morrow, 1 S.W. 93, 89 Mo. 174.

Mo. 1901. A defect in a sheriff's deed given at a sale under an execution issued by the circuit court clerk, in that it failed to recite that execution had been returned nulla bona in the justice court, as required by Gen.St.1865, p. 717, § 14, Id. p. 718, § 3, is not supplied by the complaint in an action to set such deed aside, which sets out the execution issued by the clerk, wherein he recites that the justice court execution was returned nulla bona, where such complaint also avers that such recital is false.

Reed v. Lowe, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Mo. 1905. Rev.St.1899, § 3017, V.A.M.S. § 513.480, provides that when an execution is levied on a homestead the homesteader shall have the right to designate and choose the part of the land to which the exemption shall apply, and that proceedings with respect to the homestead shall be stated in the return to the execution. *Held*, that it is not necessary that the sheriff's deed contain the recitals which the statute requires the execution return to set out.

Kessner v. Phillips, 88 S.W. 66, 189 Mo. 515, 107 Am.St.Rep. 368.

As a sheriff's deed to land sold under execution need recite only the names of the parties to the execution, the date when issued, and of the judgment, and other particulars recited in the execution, which necessarily includes the fact that notice was given, and as a "levy," is under Rev.St.1909, § 2195, V.A.M.S. § 513.010, defined as a "taking," which means to gain control or possession of, in any way, a sheriff's deed, need not recite that a levy was made, for the recital of notice and other formality shows that the land was taken, and hence a deed is prima facie correct although reciting an invalid levy, for that recital will be rejected as surplusage.

Mo. 1911. Butler v. Imhoff, 142 S.W. 287, 238 Mo. 584.

Mo. 1911. Barnes v. Imhoff, 142 S.W. 291, 238 Mo. 598.

Mo. 1918. Failure of return on execution to show levy, an abstract of levy being filed prior to sale, does not affect validity of deed on execution sale, reciting all the necessary facts as to levy.

Oldham v. Wade, 200 S.W. 1053, 273 Mo. 231.

Under Rev.St.1909, § 2231, V.A.M.S. § 513.275, as to recitals of sheriff's deed, sheriff's deed under special execution is not required to recite a levy upon the land sold.

Mo. 1919. Ammerman v. Linton, 214 S. W. 170, 279 Mo. 439.

Mo. 1919. Ammerman v. Linton, 214 S. W. 174.

Sheriff's deed under special execution, reciting dates of, and parties to judgment and execution, receipt of execution by sheriff, fact that special execution recited that judgment was a lien and charge upon the real estate, particulars of execution, description of land, and manner of notice and details as to sale, *held* valid upon its face without recital of levy, under Rev.St.1909, § 2231, V.A.M.S. § 513.275.

Mo. 1919. Ammerman v. Linton, 214 S. W. 170, 279 Mo. 439.

Mo. 1919. Ammerman v. Linton, 214 S. W. 174.

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Mo.App. 1885. A sheriff's deed of property belonging to I. C. B., reciting that the sale was made on a judgment against H. C. B. & Sons, is void on its face.

Page v. Bettes, 17 Mo.App. 366.

⇐312. —— Description of property.

Mo. 1842. A sheriff's deed describing the land sold as "three and one-half eighths of the Boonville tract, situated in Cooper county, on the south side of Missouri river," is not void for uncertainty.

Hart v. Rector, 7 Mo. 531.

Mo. 1844. Plaintiff was the owner of a quarter section, about 25 acres of which was laid off into 48 lots. One of the lots, 90 by 150 feet, did not belong to plaintiff. The streets and lanes were unopened, designated by no monuments, and covered with brush and timber, with a single highway through the tract. Under an execution against plaintiff, the sheriff levied on the whole quarter section, describing it as the "northwest fractional quarter of section 35," etc., and sold the whole tract by such description. *Held*, that the description was sufficiently certain.

Rector v. Hartt, 8 Mo. 448, 41 Am.Dec. 650.

Mo. 1853. Where a sheriff's deed described the land sold under execution as all the right of the debtor in and to 35 acres in a specified quarter section, with no further description, proof that the debtor owned and lived on one tract containing that quantity, and owned no other in that quarter section, and that these facts were notorious, was a sufficient identification.

Bank of Missouri v. Bates, 17 Mo. 583.

Mo. 1864. A sheriff's deed of land sold under execution, describing it as "containing 1,500 arpens, more or less, being a part of a tract of 1,800 arpens," without other evidence, is void for uncertainty of description, and did not pass title to either the entire tract or to 15 parts thereof out of 18, as a private conveyance would have done, as the rule that conveyances are to be strictly construed against the grantor is not applied to execution sales.

Clemens v. Rannells, 34 Mo. 579.

Mo. 1869. In a sheriff's deed, the description of the land thereby conveyed was so imperfect that nothing could pass by it alone. The deed recited that the sheriff had given notice of the time and place of sale and of the real estate to be sold in the St. Louis Daily Union, a copy of which advertisement was annexed and made part of the deed. In the granting part, the sheriff transferred to the purchaser the interest of defendant in the execution to the above-described real estate. The copy of the advertisement was attached after his signature. *Held*, that the description in the deed, in no way referring to the advertisement, was not modified or controlled by it, and the advertisement could not be treated as a part of the description.

Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

Mo. 1873. A sheriff's deed described the land as "80 acres, part of the west half of section 31," etc., and recited that the sale was made by virtue of an execution against one Crow. It was shown that the land was not known by the description of "80 acres, part of west half," etc., but that it was known as "Crow's land," and that it was generally known that Crow owned no land but the said 80 acres. *Held*, that the sheriff's deed was not void for insufficiency of description, and that the sale thereof passed title.

McPike v. Allman, 53 Mo. 551.

Mo. 1874. Where it is shown that land described in a sheriff's deed is well known in the county by the description given in the deed, so that it can be seen that persons could not be misled or deceived by the description when applied to the actual premises in question, and that no sacrifice of the property could be produced by the description in the deed, it will be held to be sufficient to pass title, however vague the description may appear.

Shewalter v. Pirner, 55 Mo. 218.

Mo. 1877. A sheriff's deed recited a judgment against H. and a sale of all H.'s title to the land, described as "70 acres P. N. of N. E. of section 1, T. 59, R. 35"; the deed being dated April 7, 1865. It was shown by various persons who lived in the neighborhood of the land in controversy that H. owned and occupied the land in dispute in 1865, and that there were about 70 acres in it, and that the land was in the N. E. ¼ of section 1, Tp. 59, R. 35, and in 1865 known as the "H. Land." *Held*, that the deed was not void for uncertainty, and a finding that it embraced the land in controversy was warranted.

Adkins v. Moran, 67 Mo. 100.

Mo. 1891. Where the owner of land platted it into lots, and it was afterwards sold under execution, and the sheriff's deed therefor contained the same description as former deeds for the property, such description was sufficiently definite and certain, though no attention was therein paid to the plat of the land as made by the owner.

Hays v. Perkins, 18 S.W. 1127, 109 Mo. 102.

For references to other topics, see Descriptive-Word Index

Mo. 1892. Where property is platted, and thereafter described in a sheriff's deed without regard to the plat, but by its former name, and it is shown that it is so known in the neighborhood and assessed for taxes, the description in the deed is sufficient.

Stewart v. Perkins, 19 S.W. 989, 110 Mo. 660.

A purchaser at judicial sale took an equitable title, though the sheriff's deed did not correctly describe the land.

Mo. 1904. Manning v. Kansas & T. Coal Co., 81 S.W. 140, 181 Mo. 359.

Mo. 1911. Spence v. Spence, 141 S.W. 898, 238 Mo. 71.

⇐313. Execution.

Mo. 1837. Rev.Code, p. 370, § 21, providing for the acknowledgment by a sheriff of his deed to lands on a sale of them under execution, does not require a certification that the officer taking the acknowledgment personally knew the person making it to be the one whose name was subscribed, as required by Rev.Code, p. 218, § 10, with reference to other instruments.

Laughlin v. Stone, 5 Mo. 43.

Mo. 1842. A sheriff's deed, executed by a deputy, must be executed in the name of the sheriff.

Evans v. Wilder, 7 Mo. 359.

Mo. 1858. A seal must be affixed to a sheriff's deed to make it valid, and a court of equity is precluded from presuming that it was once sealed by the positive statement, in the answer of the party invoking the presumption, that the sheriff by mistake omitted to seal it.

Moreau v. Branham, 27 Mo. 351.

Mo. 1858. A sheriff's deed, under Act July 3, 1807, 1 Terr.Laws, p. 120, § 45, not acknowledged in court, passed no title.

Allen v. Moss, 27 Mo. 354.

Under a law requiring sheriffs' deeds to be acknowledged in the courts of the districts where the lands lie, and a certificate of such acknowledgment to be indorsed thereon by the clerk, a sheriff's deed for lands sold by him under execution, without such acknowledgment, was void, as in such sales, the property being conveyed against the debtor's will, the law must be strictly followed.

Mo. 1870. Ryan v. Carr, 46 Mo. 483.

Mo. 1871. Adams v. Buchanan, 49 Mo. 64.

Mo. 1876. No objection can be made to a recital in the acknowledgment of a sheriff's deed that "on the 12th day of December, 1875, before the judge of the circuit court within and for the county of Andrew aforesaid, in court judicially sitting, appeared," etc.

Huxley v. Harrold, 62 Mo. 516.

Mo. 1876. Where land was sold under execution by a United States marshal in 1825, his deed was properly acknowledged before the district court of which he was an officer, and to which he was required to make his return, and the certificate of the clerk of the court that the marshal was personally known to him was unnecessary.

Baker v. Underwood, 63 Mo. 384.

Mo. 1881. Under the statute requiring a sheriff's deed to be acknowledged in open court, the fact that the judge is one of the grantees does not invalidate the acknowledgment.

Lewis v. Curry, 74 Mo. 49.

Mo. 1882. Where a sheriff, at the time of making a deed, failed to acknowledge it, he could not be allowed to acknowledge it 13 years thereafter, as against an innocent purchaser without knowledge of the execution sale.

Lincoln v. Thompson, 75 Mo. 613.

Mo. 1886. A sheriff's deed, void because the sale in consummation of which it was given was not made at the term of court at which it was directed to be made, is not validated by its acknowledgment by the sheriff in open court.

Carson v. Hughes, 2 S.W. 127, 90 Mo. 173.

A sheriff's deed was excluded on the ground that it showed no impression of a sale. The certificate of acknowledgment concluded as follows: "Given under my hand and seal of office at St. Louis, this twenty-seventh day of January, 1824," and was signed by the clerk. A certified copy, made 10 years before the suit was begun, indicated that the record showed a seal. By the law in force when the deed was made, it was the duty of the clerk to indorse upon the deed the acknowledgment under the seal of the court. *Held*, where the parties had been in possession, under the deed, for 40 years, it would be presumed that the seal was attached.

Mo. 1887. Hammond v. Gordon, 6 S.W. 93, 93 Mo. 223.

Mo. 1887. Hammond v. Horton, 6 S.W. 94.

Mo. 1913. A sheriff's deed executed to the purchaser at an execution sale, which did not bear the certificate of the clerk of the court under seal that the deed was acknowledged in open court as required by

law, conveyed no title and therefore was not admissible in evidence as proof of record title.

Brannock v. McHenry, 158 S.W. 885, 252 Mo. 1.

⇐314. Delivery.

Mo. 1874. Where a deed to a purchaser at sheriff's sale is executed, acknowledged, and recorded, and his title is decreed by the court to another, and the purchaser transfers to the other his rights under the purchase, no formal delivery of the sheriff's deed to the purchaser is necessary, as the law in such cases will presume a delivery.

Kane v. McCown, 55 Mo. 181.

Mo. 1949. A sheriff's deed, although signed, does not pass title to purchaser of land at execution sale until delivery of deed, and claims to premises by purchaser at sheriff's sale are considered abandoned after lapse of many years where purchaser failed to take delivery of sheriff's deed.

Decker v. Evans, 221 S.W.2d 127.

Mo.App. 1934. Sheriff who made sale under execution had authority after expiration of term to deliver deed to purchaser at execution sale, and order directing his successor to make and deliver deed was improper.

Swabey v. Boyers, 71 S.W.2d 110.

⇐315. Recording and registration.

Mo. 1847. In ejectment by a purchaser of the land on execution against the defendant in the execution, the deed of the sheriff may be read in evidence, although not recorded.

Smith v. Willing, 10 Mo. 394.

Mo. 1890. A deed from a widow to the heirs of her deceased husband will not prevail as against a sheriff's deed to plaintiff, executed during the life of the husband, though not recorded until after the execution of the deed from the widow to the heirs.

Bailey v. Winn, 12 S.W. 1045, 101 Mo. 649.

Mo. 1904. A clerical error in the date of the record of a sheriff's deed of land, made on an execution sale, was immaterial as against the execution debtor and all others except innocent purchasers, as the deed, when delivered, related back to its execution.

Mason v. Perkins, 79 S.W. 683, 180 Mo. 702, 103 Am.St.Rep. 591.

Mo. 1949. A sheriff's deed duly executed and delivered relates back and conveys title as of inception of lien of execution or judgment, except as to intervening innocent purchasers without notice, and should be recorded since innocent purchasers may take title.

Decker v. Evans, 221 S.W.2d 127.

⇐316. Amendment or reformation.

Mo. 1871. A sheriff has not only the right, but is required, to amend a deed when the defects warrant the same, and the deed as amended will relate back to the date of the original deed.

Thornton v. Miskimmon, 48 Mo. 219.

Mo. 1874. The only remedy for a false description in a sheriff's deed is to obtain a new deed in the court whence the process issued. Equity will not aid the imperfect execution of a statutory power.

Ware v. Johnson, 55 Mo. 500, affirmed 66 Mo. 662.

Mo. 1877. Where the record of an execution sale shows that the N. ½ of the W. ½ of a particular tract was levied on, and that it was advertised and sold under the same description, and a deed given therefor, the sheriff had no power to execute a new deed conveying the whole tract, though he claimed that it was his intention to sell the entire tract, and though all the parties at the sale understood that they were bidding for the whole tract, the number of acres in which was stated to them by the sheriff.

Ware v. Johnson, 66 Mo. 662, affirming 55 Mo. 500.

Mo. 1887. Whether the misrecitals in a sheriff's deed are such as to invalidate it on its face need not be considered, where an amended deed, duly executed by the sheriff, was entirely free from such infirmities.

Dollarhide v. Parks, 5 S.W. 3, 92 Mo. 178.

Mo. 1889. It is not error to refuse to correct a sheriff's deed by making the recitals conform to the judgment and execution, even though the mistake is satisfactorily shown.

Hall v. Klepzig, 12 S.W. 372, 99 Mo. 83.

Mo. 1900. Rev.St.1889, § 4962, V.A.M.S. § 513.335, providing that where an officer shall die, or be removed from office or disqualified, after executing a defective conveyance of property sold under execution, the purchaser, or those claiming under him, may, on petition, obtain an order of court for the sheriff then in office to issue a proper deed, which shall have the same effect as if issued by the officer making the defective deed, has no application to the amendment of a deed of a sheriff while still in office; and hence such deed was issued

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with authority, though without leave of court.

Ozark Land & Lumber Co. v. Franks, 57 S.W. 540, 156 Mo. 673.

Where a defective sheriff's deed was cured by an amended deed, an intervening purchaser from the judgment debtor acquired no title, since the deed so far as the purchaser was concerned, related back to the execution sale.

Ozark Land & Lumber Co. v. Franks, 57 S.W. 540, 156 Mo. 673.

Mo. 1913. A defect in sheriff's execution deed, in that it did not bear a certificate of the clerk of the court that it was acknowledged in open court as required by law, was not curable by the record of the circuit court showing that it was so acknowledged; but under Rev.St.1909, § 2239, V.A.M.S. § 513.335, providing for the obtaining of a sheriff's deed after sale the grantor sheriff, if not disqualified, might execute a new deed, or if dead or disqualified the then sheriff might acknowledge and deliver a new deed.

Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.

Where a defect in a sheriff's execution deed in that it did not bear the certificate of the clerk of the court that it was acknowledged in open court as required by law, entitles the purchaser to a new deed under the provisions of Rev.St.1909, § 2239, V.A.M.S. § 513.335, that remedy is exclusive, and a court of equity cannot reform the defective deed.

Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.

Where there was no showing that the sheriff, whose deed was defective in that it did not bear the certificate of the clerk of the circuit court that it was acknowledged in open court as required by law, was dead, or that if alive he was disqualified by removal from office or from the state as prescribed by Rev.St.1909, § 2239, V.A.M.S. § 513.335, the court could not order the then sheriff to make a new deed.

Brannock v. McHenry, 158 S.W. 385, 252 Mo. 1.

⇐317. Cancellation.

Mo. 1901. Where plaintiff's undivided interest in land was sold on execution against her, and on partition by the execution purchaser other parties purchased the interest, it being established in a suit by plaintiff to set aside the sheriff's deed that no process had been served on her in the action in which the judgment against her was rendered, plaintiff was entitled to a cancellation of the deed to the purchasers on partition sale, and to an accounting for the rents and profits of her interest.

Smoot v. Judd, 61 S.W. 854, 161 Mo. 673, 84 Am.St.Rep. 738.

⇐318. Construction and operation.
⇐319. —— In general.

Mo. 1852. A sheriff's deed, under an execution against A., described the land conveyed at 30 feet front by 150 feet deep, upon which stood A.'s house, and bounded north by a lot of B., south by a vacant lot, etc. More than 20 years afterwards, it appeared that A., in locating the 30 feet originally sold to him and in erecting his house, had encroached 15 feet upon B.'s lot; but A. and those claiming under the sheriff's deed always remained in possession of the ground upon which the house stood. In a suit by the person who claimed under the sheriff's deed for the 15 feet of ground immediately south of the house, it was *held* that it did not pass by that deed, as the metes and bounds therein given were not inconsistent with the further description of the lot conveyed as 30 feet upon which the house stood.

Mellon v. Hammond, 17 Mo. 191.

Mo. 1855. D. originally owned 10,256 arpents of land, out of which he had conveyed 4,000 to his son, and afterwards mortgaged 4,426 arpents, described as his remaining interest. A sheriff's deed subsequently conveyed all his interest in the whole tract, except 4,426 arpents, described as sold by the sheriff at a previous term of court, of which previous sale there was no evidence in the record. *Held*, that the sheriff's deed passed no interest in the 4,426 arpents covered by the mortgage.

Chouteau's Ex'r v. Burlando, 20 Mo. 482.

Mo. 1859. C. owned a certain interest in two sections of land, under a conveyance made to D. and E., subject to rights acquired by B. under a previous conveyance, and also, by another deed, the estate so conveyed to B. A sheriff's deed was given conveying "all the right, title, interest, and claim of C. in and to the tracts," which were described, after which there followed this further description: "Being the same property conveyed by A. to D. and E. by deed dated 28th of June, 1839, and recorded in Book O, pp. 351 and 352." *Held*, that the purchaser, by this sheriff's deed, acquired title to that interest only which was vested in C. under the deed from A. to D. and E., and not to that held by him at the date of the levy and sale under the title acquired by B. from A.

Parks v. Watson, 29 Mo. 108.

Mo. 1869. The same presumption of intendment cannot be inferred from a sheriff's deed as from a direct conveyance from the grantor, who has voluntarily sold his property and received the proceeds, and everything should be construed more strongly against him than the grantees.

Nelson v. Brodhack, 44 Mo. 596, 100 Am.Dec. 328.

Mo. 1873. A sheriff's deed is prima facie evidence that the grantee holds all the title and interest in the land that was held by the judgment debtor at the time of the rendition of the judgment or at any time thereafter up to the sale of the premises, and of the validity of the judgment itself.

Union Bank v. Manard, 51 Mo. 548.

Mo. 1874. A sheriff's deed, after reciting a judgment against N., G., and J., and the issuance of an execution thereon, as also another judgment against N. and J., and the issuance of an alias execution thereon, and the levy and sale thereunder of the right, title, and interest of N. and J. in certain land, proceeded to convey to the vendee all the right, title, and interest of N., G., and J. therein which he might sell by virtue of the execution. *Held*, that G.'s title thereto did not pass.

Julian v. Boren, 55 Mo. 110.

Mo. 1874. In an action of ejectment, the introduction by the defendant of a sheriff's deed of the plaintiff's title is an admission that the plaintiff owned the property at the date of the execution sale.

Rumfelt v. O'Brien, 57 Mo. 569.

Mo. 1887. Gen.St.1866, p. 541, § 44, provides that, where the time of holding the terms of court shall be changed, all sales of property which would have been made at terms previously established shall be made at the first term of the court to be held in pursuance of such change, and that, where such sales have been advertised to be made on any day of such previously established term under execution, the sale shall be made on the same day of the term held in pursuance of such change, but the sheriff shall put up at the front door of the court house of the proper county, before the first day of the changed term, a list of the property to be sold, specifying the names of the parties, the day of sale, and stating that such property had been previously advertised. *Held*, that where a sale is made under such section, if the sheriff's deed fails to state that the notice of sale was put up "at the front door of the court house," it will be presumed, without evidence to the contrary, that it was done, as such section requires.

Evans v. Robberson, 4 S.W. 941, 92 Mo. 192, 1 Am.St.Rep. 701.

Mo. 1890. Rev.St.1835 (2d Ed.) 1840, p. 339, § 3, provided that the lien of a judgment should begin when the judgment was rendered. Page 256, § 17, provided that on execution might be sold the real estate whereof the defendant or any one for his use was seised in law or equity on the day of the rendition of the judgment, or at any time thereafter. *Held* that, where a sheriff's deed recited a levy on a judgment debtor's lands, and purported to convey them, the interest passed was that of the debtor at the time of the judgment, though the deed recited that the interest conveyed was that of a subsequent date.

Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.St.Rep. 618.

Mo. 1912. A sheriff's deed on execution sale reciting that the sheriff exposed for sale at public auction all the right, title, interest, and estate of the debtor to the highest bidder, and that the same was stricken off and sold, and that the sheriff does hereby assign, transfer, and convey to the said purchaser, his heirs, and assigns forever all rights and appurtenances thereunto belonging, with a testimonium clause, was sufficient.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

While a sheriff's deed under an execution sale is not entitled to as liberal presumptions in its favor as a direct conveyance by a grantor, it should be construed according to its face intendments, as courts look favorably on judicial sales.

Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

Mo.App. 1918. A constable's bill of sale of corporate stock is not prima facie evidence of a valid judgment, levy of execution, or other proceedings, under Rev.St.1909, §§ 2230, 2331, V.A.M.S. §§ 513.125, 513.275.

Baumann v. Horn, 204 S.W. 53, 199 Mo. App. 555.

Mo.App. 1940. Where deed created spendthrift trust for creator's son for life, son's only interest was that of an equitable life estate in income or its equivalent and he had no interest which was subject to be seized and sold under execution, and purchaser at execution sale acquired no right, title or interest in property by virtue of sheriff's deed.

Gentemann v. Dyer, 140 S.W.2d 75, transferred 132 S.W.2d 1022.

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⇐320. —— Conclusiveness of recitals.

Mo. 1866. Under Rev.St.1855, p. 748, § 56, requiring the officer selling realty to make a deed reciting certain facts, the recitals in a sheriff's deed to defendant in execution are presumptive evidence of the existence of the judgment and the execution and the other facts therein recited.

McCormick v. Fitzmorris, 39 Mo. 24.

Mo. 1871. The recitals in a sheriff's deed are conclusive only on the parties to the deed and those claiming under them.

Durette v. Briggs, 47 Mo. 356.

Mo. 1871. Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are prima facie evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts; but the recitals may be invalidated or destroyed by a party resisting the deed.

Samuels v. Shelton, 48 Mo. 444.

Mo. 1873. Where defendant in ejectment claims under a sheriff's deed, matters dehors the record in the action in which the sheriff's sale was made cannot be inquired into to impeach such deed.

Hardin v. McCanse, 53 Mo. 255.

Mo. 1876. A sheriff's deed, regular on its face, is prima facie evidence of the truth of the recitals therein contained.

Huxley v. Harrold, 62 Mo. 516.

Mo. 1887. A sheriff's deed reciting that he gave notice that certain property would be sold between the "lawful hours" of the day specified, and further reciting that the property was sold "between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of that day," shows that the sale was proper and valid as to time of day when made.

Evans v. Robberson, 4 S.W. 941, 92 Mo. 192, 1 Am.St.Rep. 701.

Mo. 1888. Rev.St.1879, § 2999, provides that, "when defendant is a resident of the county," execution on a justice's judgment must issue and be returned nulla bona, before an execution can issue from the circuit court on the transcript. *Held* that, where a sheriff's deed contains a recital that the execution was issued from the circuit court on a transcript of judgment rendered by a justice, it will be presumed that the execution was properly issued. The validity of the proceedings under such an execution cannot be assailed collaterally, for reasons outside the record, when no want of jurisdiction appears on the face of the papers in the circuit court.

Sachse v. Clingingsmith, 11 S.W. 69, 97 Mo. 406.

Mo. 1890. A sheriff's deed cannot be attacked in a collateral proceeding because it recites a judgment against three defendants, and a direction to levy against one only, where the levy was made on the land of such defendant, and the land sold accordingly.

Owen v. Baker, 14 S.W. 175, 101 Mo. 407, 20 Am.St.Rep. 618.

Mo. 1904. Under Rev.St.1899, § 3210, V.A.M.S. § 513.275, providing that a sheriff's deed shall be evidence of the truth of its recitals, the introduction of such a deed of the land in controversy to plaintiff in ejectment established a prima facie case showing his right to recover the land.

Cummings v. Brown, 81 S.W. 158, 181 Mo. 711.

The prima facie case established by the introduction of a sheriff's deed of the land in controversy to plaintiff in ejectment may be overcome by the defendant's introduction of the whole record in the case, showing that the judgment on which the deed was founded was invalid.

Cummings v. Brown, 81 S.W. 158, 181 Mo. 711.

Mo. 1925. Recitations in sheriff's deed are prima facie evidence of facts stated.

Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.

Mo. 1937. Recitals of sheriff's execution deed are sufficient prima facie evidence of facts therein stated and conclusive as to regularity of all essential proceedings, in absence of contrary showing. Mo.St.Ann. § 1211, p. 1449, V.A.M.S. § 513.275.

Thorp v. Daniel, 99 S.W.2d 42, 339 Mo. 763.

⇐321. —— Relation back.

Mo. 1845. A sheriff's deed pursuant to execution does not take effect from the time when it is made, but relates back to the date of sale, vesting a legal title from that period.

Alexander v. Merry, 9 Mo. 514.

The general rule that a sheriff's deed of land sold under execution will relate back and take effect from the sale applies to the parties only, and does not affect the intervening rights of strangers to the sale.

Alexander v. Merry, 9 Mo. 514.

Mo. 1847. The title of a purchaser of land under an execution relates back to the time at which the lien attached, and he will

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be entitled to all the rights of the defendant at such time.

Page v. Hill, 11 Mo. 149.

Mo. 1848. A sheriff's deed relates back to the day of sale, and vests the title as of that date; hence, in ejectment by the purchaser, commenced after sale and confirmation, it is no objection to the sheriff's deed as evidence that it bears date, and was in fact executed, since suit began.

Crowley v. Wallace, 12 Mo. 143.

Mo. 1850. The title of land sold on execution can pass only by deed duly executed, and, when executed, it relates back to the time of sale as between parties and privies, but not so as to affect intervening purchasers.

Hartt v. Rector, 13 Mo. 497, 53 Am.Dec. 157.

A sheriff's deed, although made after the commencement of a suit in ejectment, relates back to the sale, so as to vest the title in the purchaser from that time, where the rights of purchasers for a valuable consideration and without notice have not intervened.

Mo. 1872. Winston v. Affalter, 49 Mo. 263.

Mo. 1872. Strain v. Murphy, 49 Mo. 337.

As to the execution defendant and his privies, and as to strangers purchasing with notice, a sheriff's deed relates back to the date of the sale, and vests the title in the purchaser from that time.

Mo. 1872. Shumate v. Reavis, 49 Mo. 333.

Mo. 1874. Leach v. Koenig, 55 Mo. 451.

Mo. 1881. Lewis v. Curry, 74 Mo. 49.

Mo. 1872. Where plaintiff had actual notice of a sheriff's sale, and took title to the property from the execution defendant, a subsequent deed from the sheriff to the purchaser at such sale will take effect, as against the purchaser from the execution defendant, as of the date of the sale.

Shumate v. Reavis, 49 Mo. 333.

Mo. 1873. Where an execution is issued and levied on real estate while the lien of a judgment thereon is in force, and a sale under the execution is properly made and a deed executed to the purchaser, such deed will relate back to the date of the judgment, and the title that defendant had at the time will pass.

Union Bank v. Manard, 51 Mo. 548.

Mo. 1880. Sheriff's deeds, executed by the successor in office of the sheriff who made the sale, relate back to, and carry the title from, the date of the purchase, as against the execution defendant.

Estes v. Long, 71 Mo. 605.

Mo. 1880. A sheriff's deed only relates back to the day of sale as to defendant in the execution under which the sale is made and his privies and strangers purchasing with notice.

Ford v. French, 72 Mo. 250.

Mo. 1949. A sheriff's deed duly executed and delivered relates back and conveys title as of inception of lien of execution or judgment, except as to intervening innocent purchasers without notice, and should be recorded since innocent purchasers may take title.

Decker v. Evans, 221 S.W.2d 127.

Mo.App. 1885. The doctrine that a sheriff's deed is effective from the date of the sheriff's sale will not be applied as against third persons, who are neither parties, privies, or purchasers with notice.

Page v. Bettes, 17 Mo.App. 366.

(E) PROCEEDS.

⇐322. Disposition in general.

Mo. 1852. A. brought an action against B. to recover the proceeds of a sale of land under an execution in favor of B. against A., issued on a judgment which A. claimed B. had agreed to enter satisfied. On trial A. admitted he had not title to the land sold. *Held*, that he could not maintain the action.

Barada v. Inhabitants of Carondelet, 16 Mo. 323.

Mo. 1872. Although an execution under a general judgment which was based on an order of publication alone is void, yet where, with full knowledge of the facts and under a misapprehension only as to the law, one procures the issuance of the execution, purchases the property at sale under the execution, and pays the money to the attorney of the execution creditor, the latter is entitled to recover it from his attorney.

Hendrix v. Wright, 50 Mo. 311.

⇐323. Mortgages and other liens.

Mo. 1846. An execution in favor of A. against B. was levied on personal property by a constable. The sheriff on other executions levied on and sold the same property, and afterwards sold land on which C. and D. had taken a mortgage from B. After the lien of the executions attached, C. and D. purchased the land at the sheriff's sale for a sum greater than the execution in the sheriff's hands. On bill of interpleader filed by the sheriff against A., C., and D., it was *held* that A. was entitled to the satisfaction

For references to other topics, see Descriptive-Word Index

of his execution before C. and D. could apply any portion of the purchase money to the satisfaction of their mortgage.

Kring v. Green's Ex'rs, 10 Mo. 195.

Mo. 1873. Where there are several liens on land, and it is sold under one of them, the surplus, after paying the lien under which it was sold, belongs in equity to the next subsequent liens in the order of their priority.

Strawbridge v. Clark, 52 Mo. 21.

⇐324-325.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐326. Distribution among different judgments or executions.

Mo. 1838. If two executions are delivered to the officer at the same time, and levied at the same time upon the same property, the proceeds of the property are not to be applied pro rata to the two executions, but are to be first applied to the satisfaction of the oldest judgment. Rev.Code, p. 256, § 19.

Friar v. Ray, 5 Mo. 510.

Mo. 1866. Where lands are sold under junior judgments, the title to the land passes subject to the liens of all prior judgments, and the money realized from a sale under a junior judgment cannot be applied to an execution issued on an elder judgment. It should be applied to the judgment or decree under which it may have been made. 2 Rev.Code, p. 904.

Bruce v. Vogel, 38 Mo. 100.

Mo.App. 1881. Right of one of several judgment creditors, who agreed that the property should be sold under execution of one of them. See,

Knapp v. Laughlin, 9 Mo.App. 584, memorandum.

⇐327. Rights to surplus.

Mo.App. 1919. In view of Rev.St.1909, § 2173, V.A.M.S. § 513.025, describing the form of execution issued by the court to the sheriff, a surplus fund in the hands of the sheriff after satisfying execution is not in custodia legis, so as to be subject to the court's order to the sheriff to pay it into court, despite interposed claims to the fund and the pendency of an interpleader proceeding elsewhere.

Wilkinson v. Wilkinson, 216 S.W. 1015.

The circuit court of St. Louis, which tried a divorce suit, had no jurisdiction over the sheriff of Perry county to make an order on him to pay a surplus fund, arising from sale of defendant husband's land under execution, into the St. Louis court, where there were several claimants to the fund, one of whom was not before the St. Louis court, and an interpleader proceeding instituted by the sheriff was pending in Perry county, wherein the rights of all claimants could be determined.

Wilkinson v. Wilkinson, 216 S.W. 1015.

⇐328. Proceedings for distribution.

Mo. 1874. Although a sheriff might be upheld in appropriating money received under an execution to a writ against an execution creditor, his proper course is to return the money and executions to the court for disposal.

State ex rel. Wilson v. Taylor, 56 Mo. 492.

Mo.App. 1932. Judgment sustaining motion to direct sheriff to collect and distribute proceeds of sale under execution *held* reversed, where there was no testimony introduced to support motion and truth of its allegations was not admitted. Rev.St.1929, §§ 1153, 3179, V.A.M.S. §§ 429.260, 513.025.

Dierks & Sons Lumber Co. v. Taylor, 46 S.W.2d 244, 226 Mo.App. 746.

⇐329. Liabilities of purchaser as to application of proceeds.

Mo. 1894. A purchaser at a sheriff's sale is obliged to look only to the judgment, execution, levy, and sheriff's deed and is not bound to take notice of a subsequent order of the court directing the payment of the excess of the proceeds, and the same rule applies in favor of those who acquire title from the purchaser at the execution sale.

Childers v. Schantz, 25 S.W. 209, 120 Mo. 305.

VIII. RETURN.

⇐330. Necessity.

For cases from other jurisdictions, see other Key Number Digests.

⇐331. Officer who must make.

Mo. 1888. Under Rev.St.1879, § 2338, an execution may issue returnable, at plaintiff's option, either to the first or second term after its issuance; and, in the absence of a showing to the contrary, it will be presumed that the sheriff who sold under the execution complied with the law.

Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.St.Rep. 307.

Mo. 1895. Under Gen.St. par. 4567, providing that the sheriff shall return a writ of execution "within" 60 days from the date thereof, a return at any time before the ex-

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piration of such period is not premature if defendant is notoriously insolvent.
Guerney v. Moore, 32 S.W. 1132, 131 Mo. 650.

⇐332. County or court to which return must be made.

For cases from other jurisdictions, see other Key Number Digests.

⇐333. Time for making.

Mo. 1858. An execution cannot regularly be returned before the return day thereof.
Dillon v. Rash, 27 Mo. 243.

Mo. 1885. Where an execution by law has a fixed return day, it should not be returned before that day.
Marks v. Hardy, 86 Mo. 232.

Mo. 1925. Writ of execution returnable in vacation merely erroneous and not void.
Heather v. City of Palmyra, 276 S.W. 872, 311 Mo. 32.

Mo. 1930. Postponement of return of execution until second term after its issuance was authorized. Rev.St.1919, § 1606, V.A.M.S. § 513.030.
State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130.

⇐334. Form and requisites.

⇐335. —— In general.

Mo. 1848. A return on an execution to the effect that the same was not levied for want of sufficient goods and chattels is prima facie a sufficient return.
State, to Use of Poor, v. Steel, 11 Mo. 553.

Mo. 1856. The filing of a writ of execution without any indorsement upon it, showing the manner in which it has been executed, does not amount to a return of the writ.
Nelson v. Brown, 23 Mo. 13.

Mo. 1863. A return upon an execution without the officer's signature thereto is bad.
Bennett v. Vinyard, 34 Mo. 216.

Mo. 1866. The fact that the sheriff's return on a levy on real estate did not state that notice had been given to the tenants in possession of the premises 10 days before the return thereof, nor give any reason why it was not done, will not render the sale under the levy void.
Durossett's Adm'r v. Hale, 38 Mo. 346.

Mo. 1870. A mistake of one day in the return of a sale of land by the sheriff will not affect the validity of the return, provided that the deed on its face is according to law, showing a sale at an authorized day during term of court.
Buchanan v. Tracy, 45 Mo. 437.

Mo. 1874. The officer holding an execution is bound to apprise the debtor of his rights; and, where there is a garnishment on which the debtor makes his selection and claim, the officer must show the facts in his return on the execution.
State, to Use of Conklin, v. Barada, 57 Mo. 562.

Mo.App. 1888. It is not requisite to a valid levy on a growing crop that the officer take the witnesses to the place of the levy and indorse the fact on the return.
Bilby v. Hartman, 29 Mo.App. 125.

⇐336. —— Description of property.

Mo. 1851. A return on an execution of the seizure of "the hull and other parts of [a steamboat] lying at the wharf and partly broken up" is sufficient to authorize an order to sell said boat with her tackle, apparel, and furniture.
Gaty v. Garrison, 14 Mo. 33.

Mo. 1862. The sheriff's return of a levy should describe the land with as much certainty as a sheriff's deed.
Henry v. Mitchell, 32 Mo. 512.

Mo.App. 1891. The only thing required of an officer levying on property already in the possession of another officer under a prior writ is to notify the officer so in possession of the levy, and it is not essential to describe in the return the property sought to be levied on.
State ex rel. Frank v. Curran, 45 Mo. App. 142.

⇐337. Record.

For cases from other jurisdictions, see other Key Number Digests.

⇐338. Amendment.

Mo. 1854. A sheriff may by leave of court amend his return after his term of office has expired.
Miles v. Davis, 19 Mo. 408.

Mo. 1867. Where an amendment is made to the return of the execution by the sheriff at a time subsequent to that at which the return was made, it will relate back to the proper return day.
Webster v. Blount, 39 Mo. 500.

Mo. 1870. The right of a sheriff to amend a defective return on leave of the court is beyond question, and it makes no

For references to other topics, see Descriptive-Word Index

difference that he is out of office. There is no specific limitation of time within which this class of amendments must be made, although, after a lapse of years, the court should grant applications with great caution, lest the rights of innocent third parties should be injuriously affected.

Scruggs v. Scruggs, 46 Mo. 271.

The return upon an execution omitted to describe the real estate sold, but the sheriff's deed conveying the land described it minutely. In ejectment, brought many years afterwards against the original defendants in execution, *held*, that the sheriff, not being dependent on his memory, but being furnished by the deed with the means of accurately supplying the defects, might amend his return so as to make it show what lands were sold and who was the purchaser.

Scruggs v. Scruggs, 46 Mo. 271.

Mo. 1902. A sheriff has a right to amend his return under leave of court, with the aid of written memoranda.

State ex rel. McLain v. Jenkins, 70 S.W. 152, 170 Mo. 16.

Mo.App. 1878. Discretion of trial court in allowing amendments to officer's return. See,

Fogg v. Bowman, 5 Mo.App. 579, memorandum.

Mo.App. 1896. Rev.St.1889, § 2111, V.A.M.S. § 506.190, provides that returns made by officers may be amended in matters of form by the court to which such returns shall be made. *Held*, that where a constable's return on an execution failed to disclose any valid levy or sale, in an action on the indemnifying bond taken by the constable under section 6311, § 511.130 note, it was error to permit the constable to amend his return, so as to supply such defects.

Bunton v. Adams, 65 Mo.App. 6.

Mo.App. 1920. Where notice of motion for an order to amend sheriff's return made by the purchaser at execution sale was served on one H. as attorney for appellants, who had acquired the remaining interests of judgment debtors, and appellants appeared and participated in the hearing, they cannot attack the sufficiency of the notice on the ground that there was nothing to show that H. was or would be their attorney.

Sibole v. McKinnies, 217 S.W. 577, transferred from Supreme Court 213 S.W. 795.

Under Rev.St.1909, §§ 1851, 1861, V.A.M.S. §§ 506.190, 509.400, 509.500, 511.270 note, a purchaser at execution sale is entitled to have the sheriff's return amended so as to correct defects of form and to speak the truth.

Sibole v. McKinnies, 217 S.W. 577, transferred from Supreme Court 213 S.W. 795.

Where judgment debtor had disposed of all interests he might retain in land which the sheriff sold at execution, neither he nor the judgment creditor need be notified of the motion made by a purchaser at execution sale to correct the sheriff's return.

Sibole v. McKinnies, 217 S.W. 577, transferred from Supreme Court 213 S.W. 795.

The right of a purchaser at execution to have the sheriff's return amended to correct errors cannot be denied because the sheriff is out of office at the time of the amendment; the matter being one resting within the discretion of the trial court.

Sibole v. McKinnies, 217 S.W. 577, transferred from Supreme Court 213 S.W. 795.

⇐339. Defects, objections, and waiver.

For cases from other jurisdictions, see other Key Number Digests.

⇐340. Quashing or setting aside.

Mo. 1878. A motion to quash the portion of a sheriff's return setting off a homestead as exempt was an appropriate manner of reaching an unwarranted exemption.

Creath v. Dale, 69 Mo. 41.

⇐341. Construction.

Mo.App. 1898. Though the return of a constable on a writ of execution did not in terms state that he made a levy on the property, but did state that he sold and delivered the possession thereof to the defendant under the writ, it might be fairly inferred therefrom that he had previously actually seized the property thereunder.

Howard v. Baum, 73 Mo.App. 235.

Mo.App. 1920. A sheriff's return on execution, reciting levy upon farm implements, stock, corn, etc., and the filing of third party claims as to portions of the property levied upon, not including the corn, and that "by order and direction of plaintiff herein * * * I release the levy made hereunder," *held* to recite the release of the levy upon all the personal property, and not merely that claimed by the third parties.

State ex rel. Hurst v. Bode, 219 S.W. 1001.

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⇐342. Operation and effect.

⇐343. —— In general.

Mo. 1845. In an action against a constable, on his bond, for neglecting to sell property levied on, on execution, defendant is estopped to show a different state of facts from what is set forth in the return.

Boone County v. Lowry, 9 Mo. 24, 43 Am.Dec. 532.

Mo. 1846. In a proceeding to recover the purchase money of goods sold on execution, the officer's return is competent evidence.

Hensley v. Baker, 10 Mo. 157.

Mo. 1848. The return of an officer on an execution, showing that he has acted under the directions of the plaintiff, is admissible in evidence in his favor.

State, to Use of Poor, v. Steel, 11 Mo. 553.

Mo. 1850. The return of an officer on process is evidence in his favor in an action on his bond for not executing the process.

State, to Use of Kirkland, v. Ferguson, 13 Mo. 166.

Mo.App. 1877. Effect of return on execution as showing full payment. See,

Manufacturers' Union Co. v. Todd, 4 Mo. App. 591, memorandum.

Mo.App. 1888. The date of the levy of an execution and the proceedings at the time of the levy may be proved by parol.

Bilby v. Hartman, 29 Mo.App. 125.

Mo.App. 1903. In an action against a constable for failure to execute a writ, the recital in the constable's return to the writ that he returned the same by direction of plaintiff's attorney, in order that another execution might be issued to another constable, was only prima facie evidence of such fact.

State ex rel. Clement v. Rainey, 73 S.W. 250, 99 Mo.App. 218.

Mo.App. 1920. A recital in a sheriff's return on an execution that he had released his levy upon personal property after third party claims had been filed is prima facie evidence of the fact recited in favor of the officer.

State ex rel. Hurst v. Bode, 219 S.W. 1001.

⇐344. —— Conclusiveness.

Mo. 1878. The sheriff's return on an execution that a levy was made is conclusive of that fact in an action on a bond given the sheriff by the execution creditor, which also recites a levy.

Anthony, to Use of Deggendorf, v. Bartholow, 69 Mo. 186.

Mo. 1885. In an action against a sheriff and an execution plaintiff, based on the allegation that the property sold was exempt from execution, defendants can deny the plaintiff's ownership of the property in controversy. The return of the sheriff upon the execution is not conclusive as against defendants.

Decker v. Armstrong, 87 Mo. 316.

The contradiction of a return in such case, by showing that the property was in fact owned by the execution plaintiff, does not affect any right of the defendant in the execution. It will not revive the debt against her, extinguished by the sale of the property in question and application of the proceeds to her credit, nor in any collateral proceeding can the debt thus extinguished ever be revived against her.

Decker v. Armstrong, 87 Mo. 316.

Mo. 1904. A sheriff's return on an execution that the price of land sold thereunder has been paid was conclusive in an action between the purchaser at the execution sale and one claiming under a deed from the execution debtor.

Mason v. Perkins, 79 S.W. 683, 180 Mo. 702, 103 Am.St.Rep. 591.

Mo.App. 1900. Where a sheriff's return of an execution expressly recites that he levied on certain personal property after having made an independent levy on a lot, and it appears that the levy on the personal property was insufficient, it cannot be contended that the levy on the lot covered such personalty; the return being conclusive on that question.

Hopke v. Lindsay, 83 Mo.App. 85.

Mo.App. 1936. Recital of no property found, in sheriff's return to general execution issued on judgment of circuit court, *held* prima facie proof of facts stated therein and admissible to prove such facts.

O'Byrne v. McCormick, 92 S.W.2d 1005, 230 Mo.App. 520.

⇐345-346.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐347. Failure to make.

Mo. 1882. The failure of a sheriff, after making a sale of land under execution, to make return of sale, did not affect the validity of his deed or the title of the purchaser thereunder.

Bray v. Marshall, 75 Mo. 327.

For references to other topics, see Descriptive-Word Index

IX. PAYMENT, SATISFACTION, AND DISCHARGE.

⇐348. Payment.

Mo. 1846. Where a sheriff pays an execution out of his own funds to the plaintiff, it satisfies the execution, and the sheriff cannot afterwards have another execution on the same judgment for his own benefit.

Garth v. McCampbell, 10 Mo. 154.

Mo. 1859. A sheriff levied an execution on a lot of gold, silver, and copper coin and paper currency belonging to a third person. The latter, with a view to facilitate the instituting of a suit to test his title, substituted bank bills of large denomination for the property on which the execution was levied; the exchange being made with an understanding that replevin would be brought by the third person for the possession of the bank bills thus substituted. *Held*, that the exchange, having been made for the convenience of bringing suit, could not be regarded as a voluntary payment of the execution, and hence the third person could maintain replevin for the bills.

St. Louis, A. & C. R. Co. v. Castello, 28 Mo. 379.

Mo. 1873. As the husband is competent to receive payment of a judgment in favor of himself and wife, not shown to be her separate property, so the debtor is protected in paying the amount to the sheriff, to be applied to an execution against the husband only.

Burgess v. Cave, 52 Mo. 43.

Mo.App. 1936. Surety cannot summarily proceed at law to enforce execution issued on judgment which has been rendered against principal and surety and which has been paid by surety and has been assigned to him. Mo.St.Ann. § 2941, p. 7841, V.A.M.S. § 433.070.

First Nat. Bank v. Barrett, 94 S.W.2d 928, 230 Mo.App. 1196.

Execution issued on judgment rendered against principal and surety and paid by surety and assigned to him can be quashed on motion. Mo.St.Ann. § 2941, p. 7841, V.A.M.S. § 433.070.

First Nat. Bank v. Barrett, 94 S.W.2d 928, 230 Mo.App. 1196.

⇐349. Set-off of execution.

Mo. 1847. Under Rev.Code 1845, p. 1006, one execution cannot be set off against another in the hands of the sheriff, where the sum due on the first execution had been in good faith assigned before the latter execution was delivered to the officer, and the delivery of the execution to the officer is to be deemed the time at which plaintiff becomes entitled to the amount due thereon.

Primm v. Ransom, 10 Mo. 444.

Mo. 1908. Rev.St.1899, § 4493, Ann.St. 1906, p. 2461, V.A.M.S. §§ 509.420, 509.430, 511.040, declares that a set-off shall be pleaded as provided by law, and, if the amount of set-off be equal to plaintiff's demand, plaintiff shall recover nothing by his action, and, if it be less than plaintiff's demand, plaintiff shall have judgment for the residue only, and section 4494 provides that, if there be found a balance due from plaintiff to defendant, judgment shall be rendered for defendant for the amount thereof, together with costs. *Held*, that where the claim of the plaintiff is in tort, and that of the defendant is in contract, a set-off cannot be allowed in the judgment, but, if plaintiff reduces his claim to judgment and sues out an execution thereon, defendant may likewise have an execution on his judgment, and both executions coming into the hands of the sheriff, one may be set off against the other as prescribed by section 4497, page 2462, V.A.M.S. § 509.420 note.

Caldwell v. Ryan, 108 S.W. 533, 210 Mo. 17, 124 Am.St.Rep. 717, 14 Ann.Cas. 314.

Rev.St.1899, § 4497, Ann.St.1906, p. 2462, V.A.M.S. § 509.420 note, provides that, when an execution is delivered to an officer to be served, the person who is debtor therein may deliver his execution to the same officer, and the officer shall apply it as far as it will extend to the satisfaction of the first execution, or, if the first execution shall be the smaller in amount, then to its entire satisfaction, and indorse the fact of such application thereon, and that the balance of the larger execution may be collected in the same manner as if there had been no satisfaction; and section 4498 prescribes when set-off shall not be allowed, but makes no reference to a judgment for conversion of exempt property. *Held*, that were plaintiff recovered judgment against defendant for conversion of mules exempt from execution, and defendant had certain judgments against plaintiff, executions issued on such judgments could be set off.

Caldwell v. Ryan, 108 S.W. 533, 210 Mo. 17, 124 Am.St.Rep. 717, 14 Ann.Cas. 314.

Mo.App. 1917. Executions are "between the same parties," within Rev.St.1909, § 1875, V.A.M.S. § 509.420 note, allowing such to be set off one against the other, though defendant's is issued on an assigned judgment, execution on which section 2158 pro-

vides shall issue in the name of the original plaintiff, indorsed for the use of the assignee.

Bauer v. Counts, 193 S.W. 874, 197 Mo. App. 233.

Right to set off execution against execution is not subordinate to the right of exemption from execution.

Bauer v. Counts, 193 S.W. 874, 197 Mo. App. 233.

⇐350. Delivery of property in satisfaction.

Mo. 1872. For a sheriff to receive property in satisfaction of an execution satisfies it and the judgment; and, for any failure of the creditor to realize the fruits, his recourse must be against the sheriff and his sureties.

Trigg v. Harris, 49 Mo. 176.

⇐351. Levy on personal property.

Mo. 1883. Where sufficient personal property is levied on to pay an execution, it operates as a satisfaction thereof, if nothing more appears.

State ex rel. Colvin v. Six, 80 Mo. 61.

Mo. 1896. Where an execution is levied on personal property on which there is a mortgage executed by the judgment defendant, under which it is soon afterwards sold to satisfy the mortgage debt, such levy and a sale thereunder are nugatory, and defendant is entitled to no credit on the execution on account thereof.

Young v. Schofield, 34 S.W. 497, 132 Mo. 650.

⇐352. Levy on real property.

For cases from other jurisdictions, see other Key Number Digests.

⇐353. Sale.

Mo.App. 1890. Where property was levied on and sold under execution, but the sale was set aside, and defendant kept the property, there was no satisfaction of the judgment or execution.

Weber v. Cummings, 39 Mo.App. 518.

⇐354. Arrest of debtor under execution against the person.

For cases from other jurisdictions, see other Key Number Digests.

⇐355. Release or discharge without satisfaction.

Mo. 1848. The levy of an execution upon property sufficient to satisfy the execution, its release, and the return of the property to the defendant upon an agreement with the plaintiff, do not, per se, operate as a satisfaction of the execution.

Williams v. Boyce, 11 Mo. 537.

A. purchased lands of B., and gave his notes for the purchase money. He failed to pay, and B. obtained judgment on one of the notes before a justice of the peace. An execution was levied by the constable on property sufficient to satisfy the judgment. A. then made an agreement with B., by which the original contract was to be canceled, the land given up to B. by A., the property rereleased by B., satisfaction of the judgment entered, and the notes given up. B. released the property levied on, and offered to comply with his agreement, but A. refused to give up the land. Another execution was issued by the justice of the peace, and returned nulla bona. An execution was then issued by the clerk of the circuit court, and levied on the land of A. *Held*, that the execution would not be quashed, as the levy of the first execution on property sufficient to satisfy the judgment, and its subsequent release by consent, were not per se a satisfaction of the judgment.

Williams v. Boyce, 11 Mo. 537.

⇐356. Indorsement or entry of satisfaction.

Mo.App. 1939. Where wife satisfied execution issued upon judgment granting her attorney's fees in divorce action, her attorney could not question validity of the satisfaction on ground it was not attested by the clerk of court, since the attorney was not a "party" to the cause at the time of the satisfaction. Mo.St.Ann. § 1123, p. 1408, V.A.M.S. § 511.590.

Bovard v. Bovard, 128 S.W.2d 274, 233 Mo.App. 1019.

⇐357. Vacating entry of satisfaction.

Mo. 1844. Where a judgment had been assigned, and the debtors, with notice of such assignment, paid the amount to the judgment creditor and procured from him a receipt for the same, and thereupon the judgment creditor made an indorsement on the execution, directing the sheriff to return the same satisfied, such indorsement might be vacated on motion, and a new execution issued for the benefit of the assignees of the judgment.

Laughlin v. Fairbanks, 8 Mo. 367.

Mo. 1859. Where an execution was levied upon property not belonging to the defendant therein, and the sheriff indorsed the amount of the sale in satisfaction of the execution, which amount the plaintiff was subsequently compelled to refund to the true owner, it was *held* that he was entitled to

have the return of satisfaction vacated, and to have an execution issued for the full amount of the judgment.

Magwire v. Marks, 28 Mo. 193, 75 Am. Dec. 121.

X. SUPPLEMENTARY PROCEEDINGS.

⇐358-361.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐362. Persons against whom proceedings may be maintained.

Mo.App. 1913. Rev.St.1909, § 2248 et seq., V.A.M.S. § 513.380, providing for the examination of a judgment debtor on return of execution unsatisfied, is a penal statute, and the court cannot, by construction, extend it to any one not clearly within its letter.

Ex parte Koehler, 156 S.W. 982, 174 Mo. App. 297.

⇐363-372.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐373. Proceedings for examination of debtor.

⇐374. —— Grounds in general.

Mo.App. 1913. The court, before ordering examination of a judgment debtor after return to execution unsatisfied, must, as required by Rev.St.1909, § 2249, V.A.M.S. § 513.385, find from the evidence before it that there is reasonable ground to believe that the judgment debtor has property subject to execution, or has conveyed or attempted to convey it with a design to defraud creditors.

Ex parte Koehler, 156 S.W. 982, 174 Mo. App. 297.

⇐375-376.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐377. —— Pleadings and affidavits.

Mo. 1907. Under Rev.St.1899, §§ 3227–3232, Ann.St.1906, pp. 1832–1834, V.A.M.S. §§ 388.490–388.510, providing that on the return of an execution unsatisfied an order may be granted requiring defendant to appear and give evidence touching his ability to satisfy the judgment, an application showing that the petitioner believed defendant had property subject to execution, and that he had conveyed his property to defraud, hinder, or delay his creditors, and alleging that defendant seemed to be well supplied with money, and that his manner of living indicated that he was a man of large means, was sufficient to authorize an order for examination.

Ackerman v. Green, 100 S.W. 30, 201 Mo. 231.

Rev.St.1899, § 3228, Ann.St.1906, p. 1832, V.A.M.S. § 388.500, relating to proceedings to examine an execution defendant touching his property, provides that the order for examination shall issue only in case it shall be made to appear by affidavit or other evidence that there is reasonable ground to believe that such judgment debtor has property subject to execution, such affidavit to be made to the best of the knowledge and belief of the affiant. *Held*, that an affidavit that the statements in the petition were true "to the best of the knowledge and belief of said affiant" was sufficient.

Ackerman v. Green, 100 S.W. 30, 201 Mo. 231.

Mo.App. 1904. Rev.St.1899, § 3228, V.A.M.S. § 388.500, provides that an order for the examination of a judgment debtor shall issue only if certain facts be made to appear, by affidavit, which affidavit shall be made to the "best of the knowledge and belief" of the affiant. *Held*, that an affidavit made to the "best information and belief" of the affiant is insufficient, unless the sources of the information are stated, and they are such as would be competent as direct evidence.

Ackerman v. Green, 81 S.W. 509, 107 Mo.App. 341.

⇐378. —— Order for examination.

Mo. 1907. In proceedings under Rev. St.1899, §§ 3227–3232, Ann.St.1906, pp. 1832–1834, V.A.M.S. §§ 388.490–388.510, providing for compelling an execution defendant to appear and undergo an examination touching his ability to satisfy a judgment, no notice to the judgment debtor being provided for by the statute, none is required.

Ackerman v. Green, 100 S.W. 30, 201 Mo. 231.

⇐379-392.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐393. Reference.

Mo. 1885. Where, in a proceeding under Rev.St. §§ 2410, 2414, for the examination of a debtor touching his ability to pay a judgment, the court has appointed a referee to conduct the examination and report the evidence, the referee has power to commit the debtor for contempt for failure to answer questions touching his property.

State ex rel. Ames v. Barclay, 86 Mo. 55.

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⇐395-396.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐394. Proceedings on examination.

⇐397. —— Scope of inquiry.

Mo. 1885. In a proceeding for the examination of a debtor touching his ability to pay a judgment under Rev.St. §§ 2410, 2414, a disclosure by the debtor of real estate in different counties from that where the judgment was entered does not relieve him from disclosing the location of his personal property, as, the execution having been returned unsatisfied, the court had a right to make a complete inquiry with respect to the debtor's means of discharging the judgment.

State ex rel. Ames v. Barclay, 86 Mo. 55.

In a proceeding under Rev.St. §§ 2412, 2414, for the examination of a debtor touching his ability to pay a judgment, the court has a right to be informed, not only that there is property, but as to where it is, and in whose possession it is.

State ex rel. Ames v. Barclay, 86 Mo. 55.

In a proceeding for the examination of a debtor touching his ability to pay a judgment, under Rev.St. §§ 2410, 2414, the court may examine him as to his means and property, and his refusal to answer proper questions is a contempt of court, for which he may be committed.

State ex rel. Ames v. Barclay, 86 Mo. 55.

⇐398. —— Conduct of examination.

For cases from other jurisdictions, see other Key Number Digests.

⇐399. —— Privilege of party or witness.

Mo. 1885. Where, in a proceeding under Rev.St. §§ 2410, 2414, for the examination of a debtor touching his ability to pay a judgment, the debtor appeared and submitted to the examination without making any suggestion until he refused to answer the questions on other grounds, it is of no avail to relieve him from contempt, that he was a grand juror at the time of the examination.

State ex rel. Ames v. Barclay, 86 Mo. 55.

⇐400-418.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐416. Disobedience to order or subpœna as contempt.

⇐419. —— Punishment.

Mo. 1898. Rev.St.1889, § 4971, V.A.M.S. § 513.380, provides, that whenever an execution is returned unsatisfied, the judgment creditor may, within five years thereafter, be entitled to an order requiring the debtor to appear and undergo an examination as to his ability to satisfy the judgment, and the court may issue a writ of attachment, and punish the debtor for contempt if he fail or neglect to obey such order. *Held*, that a failure to comply with an order of the court directing a debtor to deliver the property after such an examination is not punishable by imprisonment.

In re Knaup, 46 S.W. 151, 144 Mo. 653, 66 Am.St.Rep. 435.

Rev.St.1889, § 5243, V.A.M.S. § 525.280, provides that, if it appear that any garnishee had, before his garnishment, executed to any defendant a negotiable note, which at the time of the garnishment was unpaid, the court may order the defendant to deliver the same into court, and may enforce the order by attachment of the body of the party to whom directed. *Held*, where a defendant disclosed his possession of negotiable bonds at proceedings supplementary to execution, and garnishment process was served on the maker of the bonds, and the defendant ordered to deliver the bonds to a receiver appointed for that purpose, that the defendant's refusal to deliver the bonds was contempt, and punishable by imprisonment, regardless of whether the court had the power to appoint a receiver.

In re Knaup, 46 S.W. 151, 144 Mo. 653, 66 Am.St.Rep. 435.

⇐420-422.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

XI. EXECUTION AGAINST THE PERSON.

⇐423. Actions in which execution is authorized.

Mo.App. 1886. By the terms of Rev.St. § 3926, a judgment for treble damages for cutting timber may be enforced by committing the defendant to jail.

Holliday v. Jackson, 21 Mo.App. 660.

⇐424. Previous arrest or punishment in same action or in criminal prosecution.

For cases from other jurisdictions, see other Key Number Digests.

For references to other topics, see Descriptive-Word Index

⇐425. Judgments on which execution is authorized.

Mo. 1846. A judgment rendered on publication of notice, and without personal notice to the defendant, does not authorize execution against the body of defendant, but only against the property attached on mesne process.

Clark v. Holliday, 9 Mo. 711.

⇐426-453(4).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

XII. WRONGFUL EXECUTION.

⇐454. Nature and grounds of liability.

⇐455. —— In general.

Mo. 1860. A party to a judgment, who procures the issuance and levy of an execution thereunder, derives no protection from such judgment, in the matter of such levy, where the judgment is afterwards vacated for irregularity.

Young v. Bircher, 31 Mo. 136, 77 Am. Dec. 638.

Mo.App. 1885. B. had possession of property which, as between himself and A., was A., property, but which, as between the parties and B.'s creditors, might have been reached by them. An officer seized it under an execution issued on a void judgment against B. *Held*, that A. could maintain an action for wrongful seizure.

State ex rel. Lomon v. Rucker, 19 Mo. App. 587.

Mo.App. 1892. Where plaintiffs were rightfully in possession of personal property as a security which had been pledged to them by the owner for their debt, the title thus acquired was sufficient to support an action for damages against defendants for taking the property under execution against the owner, and therefore it is immaterial whether the mortgage was properly admissible in evidence or not.

Howell v. Caryl, 50 Mo.App. 440.

Where defendants, through their attorney, caused an execution to issue on their judgment against the mortgagors of personal property, and placed it in the hands of a constable, and the same was levied on property described in the chattel mortgage, which was in possession of plaintiffs as mortgagees, against the objections of plaintiffs, and the property was taken from plaintiffs' possession and removed, defendants are liable to plaintiffs for its value.

Howell v. Caryl, 50 Mo.App. 440.

⇐456. —— Wrongful issuance of execution.

For cases from other jurisdictions, see other Key Number Digests.

⇐457. —— Invalid writ.

Mo.App. 1892. If an execution levied on mortgaged property in the possession of the mortgagees was void, it afforded no protection to the execution creditors, who advised and directed or subsequently ratified the act of the constable in levying on the property. Prima facie they were trespassers ab initio for seizing the property under it.

Howell v. Caryl, 50 Mo.App. 440.

⇐458-460.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐461. Persons entitled to damages.

Mo.App. 1948. Where tenant failed to pay lumber company for lumber supplied for construction of improvements, and, while tenant was still in possession and after landlord's waiver of right to forfeit lease for nonpayment of rent, lumber company entered and removed lumber under wrongful execution issued against tenant alone, neither landlord nor his assignee had right to recover damages from lumber company for such removal.

Stauffer v. Joplin Lumber Co., 207 S.W. 2d 821.

⇐462. Persons liable.

Mo. 1841. Trespass will not lie against plaintiff in execution for the act of the officer in levying it on property by direction of such plaintiff; the latter not being present at the time of the levy, nor in any manner aiding the officer.

Dameron v. Williams, 7 Mo. 138.

Mo. 1860. A creditor who directs an officer to levy an execution wrongfully is liable for the trespass.

McNeeley v. Hunton, 30 Mo. 332.

Mo.App. 1892. The mere fact that an attorney employed by defendants to collect a note against a mortgagor of personalty, on which judgment was obtained and an execution thereon levied on the mortgaged property in possession of the plaintiff mortgagees, had been employed by plaintiffs in another suit, did not incapacitate him from accepting employment by defendants, or if so, the plaintiffs in a suit for damages from the levy are not in any way affected thereby.

Howell v. Caryl, 50 Mo.App. 440.

For later cases see same Topic and Key Number in Pocket Parts

When defendants put their note against the owner of personal property, which was mortgaged, in the hands of their attorney for collection by suit, they thereby conferred upon him authority to take such action as he should decide necessary in the prosecution of their demands, and therefore, if he directed a wrongful levy on the mortgaged property, or ratified such wrongful levy after made, defendants must be held as having approved the same, and are liable for damages to the chattel mortgagee in possession caused by such taking.

Howell v. Caryl, 50 Mo.App. 440.

Mo.App. 1926. Surety on bond executed to induce constable to proceed with sale of property under execution after it was claimed by owner *held* liable.

Long v. Robinson, 281 S.W. 78, 222 Mo. App. 503.

⇐464-465.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐463. Actions.

⇐466. —— Defenses.

Mo. 1855. It is no defense to an action by a debtor against his creditor for selling on execution property, at the time alleged to be exempted, that the debtor had, at the time of the levy and sale, other property concealed more than sufficient in value to pay the debt.

Megehe v. Draper, 21 Mo. 510, 64 Am. Dec. 245.

Mo. 1865. Where the owner of property, levied on under an execution against a third party, presented his claim to the sheriff therefor, as required by statute, and the execution plaintiff admitted the claim, and, declining to give the bond required, relinquished the benefits of the levy, it was *held* that the owner could not refuse to receive back the property; nor could he recover, in an action of trespass against the execution plaintiff, damages to the value of the property taken.

Lackland v. Owings, 35 Mo. 506.

Mo.App. 1876. One who has caused the goods of one person to be taken on execution against another is not released from his liability to the true owner by the fact that, pending the controversy, the execution debtor becomes bankrupt, and the goods are taken by his assignee from the execution creditor, who thus loses the benefit of them.

State, to Use of Lespinasse, v. Mitchell, 1 Mo.App. 386.

Mo.App. 1924. Defendant, levying execution on goods after their sale by execution debtor to plaintiff, could not defend action for conversion by showing that, after levy and before sale under execution, he sold judgment to another, taking back an indemnity agreement.

Rothenheber v. Pulitzer Pub. Co., 262 S. W. 48, judgment quashed State ex rel. Rothenheber v. Allen, 270 S.W. 633, and reversed in conformity to Supreme Court mandate 273 S.W. 1119.

⇐467-469.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐470. —— Pleading.

Mo.App. 1920. A petition for damages for wrongful levy of execution, which alleged payment of the judgment and request for statement of costs and wrongful levy thereafter without credit for the payments, but did not state the connection of defendants therewith, is demurrable under Rev.St.1909, § 1794, V.A.M.S. §§ 509.010–509.050, requiring a plain and concise statement of the facts.

Napier v. Woods, 220 S.W. 689.

⇐471. —— Evidence.

Mo. 1845. Where property was levied on by a constable, and claimed, and in a trial before the constable he found for the claimant, but the creditor directed him, notwithstanding, to sell, and gave him a bond of indemnity, it was *held*, in trover by the claimant against the creditor, that these facts were evidence, not of title, but as tending to show a trespass by defendant.

Matheny v. Johnson, 9 Mo. 232.

Where defendants in trover had obtained possession by purchasing at a sale under execution, evidence that a trial was had before the constable who had levied on the property, and that the jury had found the right to the property to be in the plaintiff, and that the defendants had indemnified the constable and directed him to sell, was not admissible as evidence of plaintiff's title to the property, but was competent to show that defendants had notice that the sale under the execution was without authority.

Matheny v. Johnson, 9 Mo. 232.

Mo.App. 1881. In an action of trespass against an execution creditor on account of the seizure of plaintiff's property, the indemnifying bonds given to the officer on making a levy were admissible to show that the sureties thereon, as well as the principal, were liable for the trespass complained of.

Peckham v. Lindell Glass Co., 9 Mo.App. 459.

For references to other topics, see Descriptive-Word Index

It was no objection to their admission against one of the defendants that he executed them for the company of which he was president, and signed them merely as president of the company, since, though he was not a party to the bonds in such sense that he could be made a defendant in a suit on them, this fact did not make him the less liable in an action for the trespass in which he was a principal actor.

Peckham v. Lindell Glass Co., 9 Mo.App. 459.

Mo.App. 1902. Plaintiff, in an action for conversion of cattle levied on and sold under execution on judgment in favor of defendant against a third person, may give in evidence an indemnity bond given by defendant to the sheriff prior to the sale.

Meyer v. Phœnix Ins. Co., 69 S.W. 639, 95 Mo.App. 721.

⇐472. —— Damages.

Mo. 1855. The measure of damages in an action of trespass for selling on execution the property of plaintiff as the property of defendant in the execution is, in the absence of aggravating circumstances, like malice on the part of the sheriff or original plaintiff, the value of the goods at the time of the seizure, with interest down to the time of the trial.

Walker v. Borland, 21 Mo. 289.

In an action for the wrongful taking of goods under execution, an instruction that the measure of damages is the value of the goods in the retail market, with interest, is erroneous, since the true measure of damages is their value, with interest, and not their value in the retail market.

Mo. 1862. State, to Use of Hayden, v. Smith, 31 Mo. 566, 573.

Mo. 1862. State, to Use of Hayden, v. Norcross, 31 Mo. 573.

Mo.App. 1878. In an action for the wrongful levy of an execution on partnership property under judgment for the debt of an individual partner, the limit of the assessment of value is not the actual value of the property seized, but the actual value of the debtor partner's interest in the property seized.

Ploss v. Thomas, 6 Mo.App. 157.

Mo.App. 1879. Exemplary damages. See, Carroll v. Green, 7 Mo.App. 596, memorandum.

Mo.App. 1911. One suing for wrongful sale of his goods under execution against a third person is entitled to the value of the goods as of the time of seizure, with 6 per cent. interest, less surplus proceeds of the sale paid to plaintiff.

Gilliam v. Globe Tailoring Co., 133 S.W. 628, 52 Mo.App. 464.

⇐473. —— Trial and judgment.

Mo.App. 1892. Where a constable, in levying an execution on property, took a portion of it against the will of plaintiffs, mortgagees in possession, and by the employment of force, and removed it to the lot on which the other property levied on was located, where it was roughly piled up and mixed, in an action by plaintiffs against the judgment creditors, there was no case justifying an instruction that if defendants offered to give possession of the goods seized, and that the goods were then in as good condition as when seized, the jury should consider the tender in mitigation of damages, since the seizure and removal of goods was of such a character as to relieve the plaintiffs of any obligation to accept it when defendants offered to return it.

Howell v. Caryl, 50 Mo.App. 440.

⇐474. —— Costs.

For cases from other jurisdictions, see other Key Number Digests.

For later cases
see
Same Topic and Key Number
in Pocket Parts

EXECUTORS AND ADMINISTRATORS

Scope-Note.

INCLUDES general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

Matters not in this topic, treated elsewhere, see Descriptive-Word Index.

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D.C.Mo. 1933. Rights and duties of administrator are statutory. Mo.St.Ann. § 94 p. 57, V.A.M.S. § 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

Mo. 1834. The property of every person who dies in this state, whether citizen or stranger, is subject to the course of administration provided by the statutes, and is regarded as in the custody of the law for the benefit of all persons interested.

Bartlett v. Hyde, 3 Mo. 490.

Mo. 1884. In Missouri the administration of estates of decedents is conducted through the probate courts, while the assets of a partnership dissolved by the death of a partner are administered and disposed of as at common law by the surviving partner, except so far as the rights and duties of the surviving partner are limited and controlled by statutory enactments.

Easton v. Courtwright, 84 Mo. 27.

Mo. 1908. Executors and administrators occupy a position of trust to those who are interested in the estate and are liable for failure to exercise that due care and skill which prudent men exercise in the management of their own affairs.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1924. It is incumbent on administrator to co-operate in speeding up administration of estate, but as trustee his specific duties in that regard are created by particular circumstances of situation in which he finds himself, and are subject to general conditions imposed on him.

State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321.

Mo. 1936. Administratrices derive their power solely from probate court's appointment.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

⇐2. What law governs.

Mo.App. 1884. An administrator appointed in Missouri, suing in Missouri to recover damages for the negligent killing of his intestate in Illinois, holds the money recovered as a statutory trustee, subject to the conditions imposed by the statute of Illinois, and the courts of Missouri will in a proper case enforce the execution of such a trust.

Stoeckman v. Terre Haute & I. R. Co., 15 Mo.App. 503, 585.

⇐3. Necessity of administration.

⇐3(1). In general.

C.C.A.Mo. 1928. Remainderman, on life tenant's death, takes directly without administration.

Buder v. Franz, 27 F.2d 101.

Mo. 1844. A. died in 1831, leaving a widow and nine children. At the time of his death, he owed debts to the amount of $70, and his property did not exceed that sum in value. The widow took possession of the property, paid the debts of the deceased, and consumed most of the property in maintaining herself and children. In 1838, the widow intermarried with B. Soon afterwards one of the sons of the deceased took out letters of administration on his father's estate, went to the house of B. in company with the other defendants, and took possession of the property in controversy as the increase of the stock left by A. B. sued the defendants in trespass, and recovered the value of the property taken. Under the peculiar circumstances of the case, the court permitted the verdict to stand, although as a general rule of law no person can acquire a right to the personal property of an intestate without administering on the estate and conforming to the provisions of the statute in such cases. Dig.1825, p. 93, § 4; p. 103, § 30; Dig.1835, p. 48, art. 2, §§ 27–29.

Craslin v. Baker, 8 Mo. 437.

Mo. 1878. The thirty-fourth section of the act concerning guardians and curators, Rev.St.1855, p. 829, which provides that "whenever a minor, having a guardian or curator, dies possessed of property, real or personal, no letters of administration shall be granted on such estate, except as provided in the next succeeding section (which is where a minor leaves debts or a will), but the county court shall proceed to distribute the personal estate among those interested by ordering the same to be paid over by the guardian or curator to the distributees," when construed in connection with the dower law, and the statute concerning executors and administrators, and the laws concerning marriages, must be restricted in its application to unmarried minors.

Norton v. Thompson, 68 Mo. 143.

Mo. 1894. It is necessary that the personal estate of a decedent pass through administration before the heirs are entitled to their distributive shares, prior to which time an administrator must represent them.

Green v. Tittman, 27 S.W. 391, 124 Mo. 372.

Mo. 1901. Where an intestate left personalty and no debts, and the heirs (all being of age) by a written agreement assigned

their interests to one of their number, who took possession of the property, the public administrator, who obtained letters on the estate 12 years later, could not recover the property from such heir.

Richardson v. Cole, 61 S.W. 182, 160 Mo. 372, 83 Am.St.Rep. 479.

Mo.App. 1881. Where a residuary legatee of a testator in whose favor a demand had been allowed against an estate dies, the legal title to his share of the demand cannot be assigned by his next of kin, so as to give the assignee right to enforce the same till such next of kin has received it as proceeds of the administration of the estate.

Rouggley v. Teichmann, 10 Mo.App. 257.

Mo.App. 1885. An heir cannot maintain an action to recover personalty of decedent without the intervention of the administrator, even though he be the sole distributee.

State ex rel. Hounsom v. Moore, 18 Mo. App. 406.

Mo.App. 1890. Administration is a necessary prerequisite to the time of the heir or devisee of personal property.

Becraft v. Lewis, 41 Mo.App. 546.

Mo.App. 1894. Where there was no administration on the estate of intestate, nor any order made by the probate court dispensing with administration, as authorized by Rev.St.1889, § 2, V.A.M.S. § 461.120, providing that, after making such order, the widow or minor children shall be authorized to collect, sue for, and retain the property belonging to the estate, the heirs at law have no authority to recover the personal property of the intestate.

McMillan v. Wacker, 57 Mo.App. 220.

Mo.App. 1896. Where the son of a deceased payee of notes procured the execution of a new note for the amount of the old ones, the payees were not discharged from liability on the old notes, inasmuch as the son had no power to consent to the substitution, so that the new note was without consideration.

Jacobs v. Maloney, 64 Mo.App. 270.

Mo.App. 1896. Where a creditor of a decedent's estate procured a debtor of the estate to pay its indebtedness to him, instead of the administrator, the latter was entitled to recover the sum so paid.

Richardson v. Dreyfus, 64 Mo.App. 600.

Mo.App. 1907. The rule that the heirs of a decedent may distribute among themselves his property without the appointment of an administrator, which is an exception to the rule that title to personalty left by an intestate vests in his administrator, is applicable only when three things concur: First, the absence of debts against the estate; second, the legal age of the heirs entitled to share in the distribution; and, third, a unanimity among them as expressed by their agreement or acts to dispense with an administrator.

Griesel v. Jones, 99 S.W. 769, 123 Mo. App. 45.

Mo.App. 1913. It should be the policy of the law to enforce industrial insurance policies, which are taken out chiefly for the purposes of procuring a decent burial without the necessity of administration.

Wallace v. Prudential Ins. Co. of America, 157 S.W. 1028, 174 Mo.App. 110.

Mo.App. 1914. Distributees may take title to personal property, even though no administration be had.

In re Landgraf's Estate, 168 S.W. 268, 183 Mo.App. 251.

Mo.App. 1915. Where heirs of intestate who left no debts distributed bank deposit, administrator *held* not entitled to recover it from the bank, though inheritance tax imposed by Rev.St.1909, § 309 (repealed 1917, p. 115), had not been paid.

Bell v. Farmers' & Traders' Bank, 174 S.W. 196, 188 Mo.App. 383.

Mo.App. 1917. Where there are two heirs to an estate, and they do not agree to the distribution of the estate without the aid of administration, the court will require the property to be turned over to an administrator.

Meyer v. Nischwitz, 199 S.W. 744, 198 Mo.App. 101.

Mo.App. 1920. Husband of deceased, who took notes belonging to deceased and claimed that she had given them to him and wrongfully withheld them for years after administration, cannot be heard to assert that they should have been administered upon in order to seek an allowance out of such assets as widower.

Marshall v. Motten, 224 S.W. 8.

Mo.App. 1940. Where will devised life estate in note secured by deed of trust to testator's wife with remainder to testator's children and grandchildren, court of equity would not require appointment of an administrator of estate of wife to perform perfunctory act of delivering note to children and grandchildren, who acquired title to note under will and not from death of wife whose interest ceased at her death, since equity regards that as done which in equity should have been done.

Woolery v. Todd, 139 S.W.2d 1005.

For references to other topics, see Descriptive-Word Index

⇐3 (2). Estate of husband or wife.

Mo.App. 1917. Under Rev.St.1909, §§ 10, 120, V.A.M.S. § 461.120, administration being legally dispensed with on wife's estate, as not greater than allowed widower, he becomes absolute owner of note owned by her at her death.

Parsons v. Harvey, 195 S.W. 530, affirmed 221 S.W. 21, 281 Mo. 413.

Mo.App. 1909. Where a husband and wife mortgage their homestead, and he dies, and there is no estate for administration, an administrator need not be appointed and made a party to foreclosure, as any surplus at the sale would go to the widow, though Rev.St.1899, c. 52, § 4346, Ann.St.1906, p. 2392, V.A.M.S. § 443.250, requires that in case of death of mortgagor his personal representative shall be made defendant.

Hardy v. Atkinson, 118 S.W. 516, 136 Mo.App. 595.

⇐3 (3). Debts necessitating administration.

Mo.App. 1910. While ordinarily the vendor of personalty should enforce his claim for the price by judgment and execution against the property, he is not deprived of his right to the purchase price by the purchaser's death, but is entitled to have an administrator appointed to have the balance of the purchase price allowed, so as to place himself in a position to obtain equitable relief.

Lazonby v. Smithey, 131 S.W. 708, 151 Mo.App. 285.

Mo.App. 1914. Filing of claim without presentation to administrator, though not sufficient as a presentation of the demand, *held* proper to advise the court of the necessity of administration.

Lipperd v. Lipperd's Estate, 163 S.W. 934, 181 Mo.App. 106.

⇐3 (4). Estate free from indebtedness.

D.C.Mo. 1926. Administration should not be had against will of heirs, where nonresident decedent, having property in Missouri, had no debts in state, and tax demands were satisfied.

Fairchild v. Lohman, 13 F.2d 252.

Under Missouri law, where no debts appear against nonresident estate, it is not necessary that administration should be had, to give creditors opportunity to present claims.

Fairchild v. Lohman, 13 F.2d 252.

Mo. 1853. The prohibition in the act concerning guardians and curators, against the issuing of letters of administration upon the estate of a deceased minor, applies to those cases only where there are no debts except those which the guardian himself has allowed to be created, and does not apply where there are demands for which the minor would have been liable to an action.

George v. Dawson's Guardian, 18 Mo. 407.

Mo. 1903. No administration on the estate of a decedent is necessary, where it appears that she owed no debts.

Johnston v. Johnston, 73 S.W. 202, 173 Mo. 91, 61 L.R.A. 166, 96 Am.St.Rep. 486.

Mo.App. 1892. Where, on the death of an intestate leaving no debts, the heirs, who were all of age, at a meeting made distribution among themselves of all the property, there being no fraud or mistake, there was no necessity for administration, and the public administrator cannot be ordered to take charge of the estate on refusal of those first entitled to administer.

McCracken v. McCaslin, 50 Mo.App. 85.

Mo.App. 1901. Where it appeared that plaintiff's ancestor had been dead 35 years, and that, at the time of his death he left no estate, except the property in question, and that there were no debts against his estate, and that no administrator had been appointed, plaintiff was entitled to maintain an action to recover such property.

McDowell v. Orphan School of Christian Church, 87 Mo.App. 386.

Mo.App. 1911. Though generally on the death of a person the legal title to his personalty passes to the administrator, with the equitable title in the distributees, an administration is unnecessary where there are no debts of decedent, and the personal property may at once vest in the distributees.

Todd v. James, 138 S.W. 929, 157 Mo. App. 416.

Mo.App. 1920. In an action against the husband of deceased to cancel notes in the hands of the husband, claimed by plaintiff to belong to the estate of deceased, will having provided for cancellation of all debts owing by plaintiff to deceased at her death, it could not be complained that the court had no right to decree the cancellation of the notes on the ground that they were subject to claims of creditors, where it affirmatively appeared that no claims of the creditors were involved, and that deceased owed no debts.

Marshall v. Motten, 224 S.W. 8.

⇐3 (5). Proceedings to determine necessity.

For cases from other jurisdictions, see other Key Number Digests.

⇐4. Fact of death.

Mo. 1952. By statute, absence of a person for seven consecutive years establishes

For later cases see same Topic and Key Number in Pocket Parts

a presumption of death, but no administration is authorized short of this time without some showing of date or place of death. V.A.M.S. §§ 461.230 to 461.250, 466.100, 490.620.

Basman v. Frank, 250 S.W.2d 989.

Mo.App. 1879. Wag.St. p. 122, § 8, empowering public administrators in certain cases to take charge of the estate of deceased persons, does not empower the public administrator to take charge of the estate of persons not dead.

Donaldson v. Lewis, 7 Mo.App. 403.

⚖5-6.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⚖7. Withdrawing estate from administration.

Mo.App. 1888. Although a widow has proceeded under Rev.St.1879, § 2, under which an order of the probate court has been made, setting the property left by deceased over to her and doing away with administration, yet this proceeding is not binding on a creditor, and does not prevent him from going before the probate court, and on a showing, having letters granted on the estate.

Woolfolk v. Kemper, 31 Mo.App. 421.

Mo.App. 1940. Where family agreement was entered into between administratrix and three sons of deceased under which estate was to be handled outside of the probate court and administratrix was to settle claims without filing or approval thereof, and to use insurance money for payment of debts and for her own support and maintenance, son who participated in the benefits both directly and indirectly and advised administratrix in carrying out the family agreement, with full knowledge of the manner in which the assets were handled, was precluded by an estoppel in pais from objecting to settlement, though administratrix failed to comply with statute in settling the affairs of the estate.

In re Helm's Estate, 136 S.W.2d 421.

Mo.App. 1952. If it appears to court upon return of inventory and appraisement that the whole amount of estate does not exceed that to which surviving spouse or minor children under 18 years of age are entitled by law without being subject to payment of debts, court may make an order that estate be delivered to surviving spouse or minor children and that all further administration be dispensed with. V.A.M.S. §§ 461.640, 462.010, 462.020, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

⚖8. Jurisdiction of courts.

⚖9. —— In general.

Mo. 1945. The probate court had right in first instance to determine its own jurisdiction to administer estate of decedent and any error in such determination was error for which proper remedy of party aggrieved was by appeal, and not by motion at a subsequent term to vacate prior proceedings in the estate. Mo.R.S.A. § 531, V.A.M.S. § 468.450.

In re Sheldon's Estate, 189 S.W.2d 235, 354 Mo. 232.

Where records of probate court of Randolph county found that decedent was a resident of Randolph county, motion challenging jurisdiction of probate court to administer estate of decedent on ground that decedent was a resident of another county would not lie, even if motion was treated as a motion in nature of a writ of error coram nobis, since it attacked the record and verity thereof of the probate court. Mo.R.S.A. § 531, V.A.M.S. § 468.450.

In re Sheldon's Estate, 189 S.W.2d 235, 354 Mo. 232.

Mo.App. 1904. The institution of a suit to partition the lands of a decedent, thereby bringing such lands within the jurisdiction of the court in which the suit is brought, does not preclude the probate court from granting letters of administration on the personal estate of the decedent.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1913. Where a foreign insurance company doing business in the state issued a policy on the life of a resident of St. Louis for the benefit of his wife and children, the probate court of that city had jurisdiction to appoint an administrator of a deceased beneficiary, who could sue on the policy.

Hartung v. Northwestern Mut. Life Ins. Co., 156 S.W. 980, 174 Mo.App. 289.

Mo.App. 1938. The probate court has no jurisdiction to appoint an administrator contrary to the statutes designating appointees and the conditions of appointment. Mo.St. Ann. §§ 7-10, pp. 9-12, V.A.M.S. §§ 461.030-461.050, 461.100.

State ex rel. Pryor v. Anderson, 112 S.W. 2d 857, mandamus quashed 123 S.W. 2d 181, 343 Mo. 895.

Mo.App. 1944. Probate court, or judge thereof in vacation, has duty of exercising

a judicial discretion as to whether applicant seeking appointment as administrator or executor is a competent and suitable person to administer the estate. Mo.R.S.A. §§ 1, 6, 7, 11, V.A.M.S. §§ 461.030, 461.060, 461.110, 461.130.

State ex rel. Evans v. Stahlhuth, 183 S.W.2d 384.

⇐10. —— Domicile of decedent.

Mo. 1881. Administration may be granted in Missouri on the estate of one who resided in Kansas at the time of his death, whether there had been any administration in Kansas or not.

Wood v. Matthews, 73 Mo. 477.

Mo. 1927. Residence of decedent is jurisdictional question determining venue of probate of estate. Rev.St.1919, § 4, V.A.M.S. § 461.010.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1890. Under Rev.St.1879, § 306, where there are assets in this state of a non-administered estate which are liable to be wasted, injured, or lost, good cause exists for ordering the public administrator to take charge of the same, and the fact that the deceased resided and died in another state, and that the legatee resided there, makes no difference.

Becraft v. Lewis, 41 Mo.App. 546.

Mo.App. 1903. Under Rev.St.1899, § 4, V.A.M.S. § 461.010, providing that letters on the estate of a decedent shall be granted in the county in which he had a house or place of abode where a testator died out of the state, leaving a place of abode in one county, letters testamentary granted by the probate court of another county cannot be disregarded by the probate court of the county in which deceased had his abode, so as to entitle the latter court to also grant letters.

In re Davison's Estate, 73 S.W. 373, 100 Mo.App. 263.

⇐11. —— Existence of assets.

C.C.A.Mo. 1914. Under Rev.St.Mo.1909, §§ 9, 56, 112, Mo.St.Ann. §§ 1, 49, 105, pp. 4, 31, 66, V.A.M.S. §§ 461.130, 461.560, 462.360, the probate court of St. Louis had jurisdiction to grant administration of the estate of a person killed in that city whose sole estate consisted of a claim for wrongful death.

American Car & Foundry Co. v. Anderson, 211 F. 301, 127 C.C.A. 587.

D.C.Mo. 1950. Probate Court in Missouri has no jurisdiction to appoint an administrator of a deceased person unless there are assets in the estate. Mo.R.S.A. § 272, V.A.M.S. § 466.010.

Becker v. Buder, 88 F.Supp. 616, affirmed 183 F.2d 311.

Under Rev.St.1899, § 292, V.A.M.S. § 461.820, requiring the public administrator to take into his charge and custody the estate of all deceased persons when money, property, papers, or other estate are left in a situation exposed to loss or damage, and no other person administers on the same, the public administrator may take charge of property of a decedent in Missouri, whether there are debts against the estate or not; the right to administration depending on the fact that there is property or assets in Missouri belonging to decedent at the time of his death.

Mo. 1906. Richardson v. Busch, 95 S.W. 894, 198 Mo. 174, 115 Am.St.Rep. 472.

Mo. 1906. De La Vergne v. Richardson, 95 S.W. 898, 198 Mo. 189.

Mo.App. 1907. In the absence of a statutory provision on the subject, there is no positive rule of law that an estate must be of a given value as a condition precedent to the granting of letters testamentary.

Turner v. Campbell, 101 S.W. 119, 124 Mo.App. 133.

Mo.App. 1911. Where, under an agreement confirmed by the bankruptcy court, all the effects of a bankrupt firm, including a judgment held by it, were assigned to parties who advanced money to discharge the firm's debts, there was no reversion of interest to the members of the firm, and hence there was nothing for the public administrator to take charge of as representing the effects of a deceased partner.

E. R. Hawkins & Co. v. Quinette, 136 S.W. 246, 156 Mo.App. 153.

Mo.App. 1913. Under Code Iowa 1897, § 225, authorizing the appointment of an administrator for a nonresident who dies leaving personal property subject to administration within the state, the right of action for the intestate's wrongful death is a property right which will authorize administration.

Voris v. Chicago, M. & St. P. Ry. Co., 157 S.W. 835, 172 Mo.App. 125.

Mo.App. 1918. The right of action given by the statute to an administrator, for the death by wrongful act of his decedent, constitutes assets of the estate of a nonresident killed within the state, sufficient to grant administration thereon.

La Duke v. Dexter, 202 S.W. 254.

Mo.App. 1946. Appointment of public administrator as administrator of estate of deceased was void where deceased left no estate and appointment was made merely to

For later cases see same Topic and Key Number in Pocket Parts

prosecute a cause of action for wrongful death of deceased, which constitutes no part of an estate. Mo.R.S.A. §§ 295 et seq., 3652, V.A.M.S. §§ 461.780, 537.070.

Donelson's Estate v. Gorman, 192 S.W.2d 29, 239 Mo.App. 300.

⚖12. —— Situs of assets.

U.S.Mo. 1878. The provision of Wag.St. Mo. p. 122, § 6, does not authorize a suit by a public administrator in Missouri against a foreign insurance company doing business there, to enforce the payment of a policy of insurance, not made or to be executed in that state, upon the life of a citizen of Wisconsin, who neither resided, died, nor left any estate in Missouri.

Union Mut. Life Ins. Co. v. Lewis, 97 U.S. 682, 24 L.Ed. 1114.

Mo. 1881. Grant of administration in the state of decedent's domicile is not a necessary prerequisite to administration in the state where decedent left property.

Wood v. Matthews, 73 Mo. 477.

A certificate for stock in a foreign corporation held in Missouri is but evidence of ownership, and not property which can be made the basis of an administration in this state.

Mo. 1906. Richardson v. Busch, 95 S.W. 894, 198 Mo. 174, 115 Am.St.Rep. 472.

Mo. 1906. De La Vergne v. Richardson, 95 S.W. 898, 198 Mo. 189.

Mo. 1919. Where an owner of stock in a national bank having its domicile in Missouri died testate in Illinois having the certificate thereof in her possession, the situs of the property represented by the certificate for administration purposes was in Missouri.

Troll v. Third Nat. Bank of St. Louis, 211 S.W. 545, 278 Mo. 74.

Mo.App. 1890. Where the holder of a note made by a resident of Missouri died at his domicile in another state, administration on his estate was properly granted in the county of the maker's residence, the situs of the assets being there, though the note itself was at the holder's domicile.

Becraft v. Lewis, 41 Mo.App. 546.

Mo.App. 1897. The delivery of a draft by a wife in Missouri to her husband, domiciled in New York, renders the money an asset to be disposed of by administration of her estate in New York, and not in Missouri, the place of her domicile at the time of marriage and death, though Rev.St.1889, § 261 et seq., V.A.M.S. § 466.080 et seq., authorizes administration upon the property and effects of nonresidents, since these statutes do not relate to property and effects not within the jurisdiction of the courts of Missouri, and although the mere blank indorsement by the wife of a check for money due her, and delivery thereof, to the husband does not constitute a sufficient written assent, within the meaning of the statute, to work a reduction to possession of the money represented by the check.

McPherson's Adm'r v. McPherson, 70 Mo. App. 330.

Mo.App. 1904. The grant of letters of administration on the estate of one dying testate in another state is proper when testator left personal property, in the form of rents and other debts due him, in the county in which the letters were granted.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1936. Administration of estate of person who died owning property in different states may be had in each of states dealing with property of estate having local situs therein.

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

⚖13. —— Particular courts.

For cases from other jurisdictions, see other Key Number Digests.

⚖14. Appointment of executor.

Mo. 1871. The fact that one has been named executor in a will does not, under the laws of Missouri, make him executor, but only gives him the right to become so on complying with the conditions required by law. He has no authority, until he has qualified, to intermeddle with the estate, except under pressing necessity, and then only so far as is necessary, although, if he so intermeddles and subsequently qualifies, his letters will relate back and cover his former acts.

Stagg v. Green, 47 Mo. 500.

Mo. 1874. The power of an executor under our law to act as such is derived, not so much from the will of the testator, as from the appointment of the court and a compliance with the law.

Lamb v. Helm, 56 Mo. 420.

Mo. 1916. Under Rev.St.1909, §§ 14, 17, 19, 50, V.A.M.S. §§ 461.050, 461.060, 461.110, 461.500, the right to letters testamentary of one named as executor in a will is absolute unless he is not lawfully entitled thereto.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas. 1918D, 454.

The rule that the expressed intention of the testator must govern applies to the clause appointing an executor.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas. 1918D, 454.

Mo. 1924. The right to make a will or appoint an executor is purely a matter of statutory regulation.

State ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 257 S.W. 784, 302 Mo. 130, reversed State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 44 S.Ct. 427, 263 U.S. 361, 68 L.Ed. 339.

Mo. 1935. Will directing appointment of named person as executor of estate may enlarge such fiduciary's statutory powers or dispense with statutory method of, and restrictions on, exercise of such powers. Mo. St.Ann. § 412, p. 261, V.A.M.S. §§ 457.350, 457.360.

McCune's Estate v. Daniel, 76 S.W.2d 403.

Mo. 1952. To be an executor under the law one must have been duly appointed by probate court and must have qualified and have accepted the appointment. V.A.M.S. § 468.580.

In re Ballard's Estate, 247 S.W.2d 683, 362 Mo. 1150.

Mo.App. 1903. A will bequeathing lawbooks and office furniture to A., expressing a desire that he send his effects to his executors, and that his private letters be burned without being read, and that A. direct anything that might be done about testator's affairs in a certain city in connection with the will, did not constitute A. executor, in view of the fact that testator was a lawyer, acquainted with the use of such terms, and in another clause had expressly requested certain legatees to act as executors.

In re Hill's Estate, 77 S.W. 110, 102 Mo. App. 617.

While no particular form of appointment of an executor in a will is required, and any language which expressly or impliedly clothes a given party with executorial authority is sufficient, yet the court must be able to gather a testamentary intent that the person named shall take charge of the estate, collect the assets, liquidate the debts, and perform the duties and possess the powers usual to the office of executorship.

In re Hill's Estate, 77 S.W. 110, 102 Mo. App. 617.

Mo.App. 1933. Statutes with reference to appointment of letters testamentary must be strictly followed. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

Mo.App. 1945. Provision in will naming testator's brother as successor executor was inoperative pending will contest.

Stoble v. Stoble, 183 S.W.2d 609.

⊂=15. Competency of person named as executor.

Mo. 1924. A corporation cannot act as an executor unless expressly authorized to so act by the statutes creating and defining the powers of the class of corporations to which it belongs, construed with statutes relating to administration.

State ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 257 S.W. 784, 302 Mo. 130, reversed State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 44 S.Ct. 427, 263 U.S. 361, 68 L.Ed. 339.

Mo. 1931. One claiming property which will directed to be sold and proceeds distributed otherwise was not "suitable person" to execute will. Rev.St.1919, § 11, V.A.M.S. § 461.060.

Arrington v. McCluer, 34 S.W.2d 67, 326 Mo. 1011.

Mo. 1951. Right of testator to appoint executor is important right, and it is policy of law and administration code to respect it, and therefore, generally speaking, courts have no discretion in respect of issue of letters testamentary to person nominated in will of deceased, unless such persons are expressly disqualified or such discretion is created by statute, and person appointed by will cannot be rejected by court except where laws expressly so provide. V.A.M.S. §§ 363.700, 461.260–461.280, 461.300.

State ex rel. North St. Louis Trust Co. v. Stahlhuth, 239 S.W.2d 515, 362 Mo. 67.

Mo.App. 1944. Probate judge did not abuse his discretion in denying application for letters testamentary by one who was named as executor in will, where applicant was claiming under a will which devised to him certain property, that heirs were preparing to contest the will, that applicant also had a large contested claim against the estate and another claim against estate of decedent's deceased sister. Mo.R.S.A. §§ 1, 6, 7, 11, V.A.M.S. §§ 461.030, 461.060, 461.110, 461.130.

State ex rel. Evans v. Stahlhuth, 183 S.W.2d 384.

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⇐16. Acceptance or renunciation by executor.

Mo. 1916. One named as executor in a will, though having absolute right to letters testamentary upon probate, if not disqualified by the statutes, may renounce his rights expressly or by acts and conduct in pais.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.

Mo. 1952. To be an executor under the law one must have been duly appointed by probate court and must have qualified and have accepted the appointment. V.A.M.S. § 468.580.

In re Ballard's Estate, 247 S.W.2d 683, 362 Mo. 1150.

⇐17. Right to appointment as administrator.

⇐17(1). In general.

D.C.Mo. 1926. Under Missouri laws, only interested parties can demand administration of estate.

Fairchild v. Lohman, 13 F.2d 252.

Mo. 1840. Administration cannot be granted to a stranger until after the lapse of the time allowed for the application of those entitled thereto; and, if letters are so granted, they should be revoked on application of those entitled by law to administer.

Mullanphy v. St. Louis County Court, 6 Mo. 563.

Mo.App. 1888. Under Rev.St.1879, §§ 7–9, providing that letters of administration shall be granted first to the husband or wife, and that, in case they do not apply within 30 days, the court, judge, or clerk may, on motion, issue a citation to appear and qualify, and, if they fail to appear within 5 days, letters may be granted to "some other person," the probate court has no authority to issue letters to "some other person" within 30 days after the death of a husband, without written renunciation of the right to letters from the wife.

Skelly v. Veerkamp, 30 Mo.App. 49.

Under Rev.St.1889, § 8, V.A.M.S. § 461.040, providing that, if no person entitled to administer apply for letters within 30 days, the court, on motion of any person interested, may issue a citation to him or them to appear and qualify within a certain time, and, on failure so to do, may grant letters to any person deemed suitable, a stranger may be appointed without citation, where the only person within the state entitled to letters has renounced.

Mo.App. 1894. In re Gerstacker's Estate, 57 Mo.App. 71.

Mo.App. 1894. Kopper v. Coerver, 57 Mo.App. 71.

Mo.App. 1895. Where two or more persons are equally entitled to administer, the choice between them lies in the court's discretion; but there is no discretion vested in the court where the statute determines the question of priority.

State ex rel. Adamson v. Collier, 62 Mo. App. 38.

Mo.App. 1903. Under Rev.St.1899, §§ 7–11, V.A.M.S. §§ 461.030—461.060, giving priority in administration first to the husband or wife, then to the distributees, and providing for the appointment of some other suitable person by the court when the persons entitled fail to apply, a nonrelative and stranger in blood to deceased is not entitled to letters as a matter of right.

In re Hill's Estate, 77 S.W. 110, 102 Mo. App. 617.

Mo.App. 1910. The general rule that Rev.St.1899, §§ 7, 9, Ann.St.1906, pp. 340, 341, V.A.M.S. §§ 461.030, 461.050, prescribing the order in which persons have the right to administer estates, and providing that where the enumerated persons fail to apply in a given time for letters, or are nonresidents, the probate court may grant letters to some other suitable person, must be observed in granting letters of administration, is not so rigid as to preclude a court from passing over a person entitled to letters in the statutory order of precedence, where the one passed over is unfit to administer the estate, and where to appoint him would subject the assets of the estate to unusual hazard.

State ex rel. Flick v. Reddish, 129 S.W. 53, 148 Mo.App. 715.

Mo.App. 1922. Rev.St.1909, §§ 15–17, V.A.M.S. §§ 461.240–461.260, prescribing who shall be entitled to administer upon the estate of a decedent, and fixing the conditions upon which other persons may be appointed as administrators, are mandatory, and the probate court has no jurisdiction to appoint an administrator in violation of their terms.

Linder v. Burns, 243 S.W. 361.

Mo.App. 1929. Sections relative to appointment of administrators must be construed together. Rev.St.1919, §§ 7–9, V.A.M.S. §§ 461.030–461.050.

In re Wilson's Estate, 16 S.W.2d 737, transferred from Supreme Court 8 S. W.2d 973, 320 Mo. 975.

Thirty days must expire after death before person other than surviving spouse or one entitled to distribution of estate can be appointed administrator. Rev.St.1919, §§ 7–9, V.A.M.S. §§ 461.030–461.050.

In re Wilson's Estate, 16 S.W.2d 737, transferred from Supreme Court 8 S. W.2d 973, 320 Mo. 975.

For references to other topics, see Descriptive-Word Index

Appointment of intestate's nephew, not entitled to share in estate, as administrator, 12 days after death, *held* void and revocable at instance of brother of intestate. Rev.St. 1919, §§ 7–9, V.A.M.S. §§ 461.030–461.050.

In re Wilson's Estate, 16 S.W.2d 737, transferred from Supreme Court 8 S. W.2d 973, 320 Mo. 975.

Statutory requirements relative to priority in appointment of administrators are mandatory, and judgment appointing administrator which on its face shows noncompliance with statute is void. Rev.St.1919, §§ 7–9, V.A.M.S. §§ 461.030–461.050.

In re Wilson's Estate, 16 S.W.2d 737, transferred from Supreme Court 8 S. W.2d 973, 320 Mo. 975.

Mo.App. 1933. Rights of particular person to administer an estate are statutory, and court has only such discretion as is expressly granted by statute. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Statutes with reference to appointment of letters of administration must be strictly followed. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Only where no one given statutory priority is competent and suitable may a stranger be appointed administrator of estate. Rev. St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Right to administer on estate is valuable one that cannot be denied to person given priority without his consent. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Mo.App. 1936. Determination of persons suitable and competent to administer estate is within discretion of probate court subject to statutory disqualifications. Mo.St.Ann. §§ 6, 7, pp. 8, 9, V.A.M.S. §§ 461.030, 461.110.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

Probate court's discretion in determining persons suitable and competent to administer estate, unless abused, is not reviewable. Mo. St.Ann. §§ 6, 7, pp. 8, 9, V.A.M.S. §§ 461.030, 461.110.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

Mo.App. 1949. Priority of right to administer upon an estate is a valuable right, and benefit of such administration cannot properly be denied without sound and valid reason. Mo.R.S.A. §§ 6–10, V.A.M.S. §§ 461.030,–461.050, 461.100, 461.110.

State ex rel. Couch v. Kelso, 217 S.W.2d 596.

⇐17 (2). Heirs and next of kin, or their representatives, in general.

Mo. 1918. Where administrator was appointed upon renunciation of other heirs in his favor, and he died, and other heirs then renounced right in favor of another of them entitled to be appointed under Rev.St.1909, § 15, V.A.M.S. § 461.030, stating order of appointment, she was entitled to be appointed administratrix de bonis non in view of section 54, § 461.540, requiring such letters to be granted to those to whom administration would have been granted if original letters had not been obtained.

State ex rel. Riesmeyer v. Holtcamp, 200 S.W. 294, 273 Mo. 124.

Mo.App. 1910. Under Rev.St.1899, §§ 7, 9, Ann.St.1906, pp. 340, 341, V.A.M.S. §§ 461.030, 461.050, prescribing the order in which persons have the right to administer the estates of decedents, etc., when considered in connection with section 42, page 349, § 461.160, authorizing the probate court to revoke letters granted, the probate court acts judicially in appointing an administrator, and the court may decline to appoint a son of intestate where the interests of the estate conflict with the interests of the estate of the mother of the son administered by him.

State ex rel. Flick v. Reddish, 129 S.W. 53, 148 Mo.App. 715.

Mo.App. 1946. Where son and daughter of deceased were the only persons entitled to distribution and within permitted class, but son was a minor stationed out of the state as a member of the United States Army, at time of father's death and at all times subsequent thereto, and daughter forfeited right to appointment as administratrix by failing to appear and qualify after being cited, the probate court had jurisdiction to appoint father of deceased as administrator of the estate. Mo.R.S.A. §§ 7–10, V.A.M.S. §§ 461.030–461.050, 461.100.

Kerr v. Prudential Ins. Co. of America, 194 S.W.2d 706, 238 Mo.App. 972.

Mo.App. 1949. First cousin of decedent who was of good character, reliable, and prepared to give bond, and was a farmer who had been township assessor, and had been on A.A.A. Board for a number of years, and was a collector for farm security was entitled to appointment as administrator of $17,000 estate consisting of farm land and United States obligations as against public adminis-

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trator notwithstanding personal enmity of another heir in absence of evidence showing incompetence or unsuitability. Mo.R.S.A. §§ 6–10, V.A.M.S. §§ 461.030–461.050, 461.100, 461.110.

State ex rel. Couch v. Kelso, 217 S.W.2d 596.

⇐17(3). Husband or wife or their representatives.

Mo. 1917. Under Rev.St.1909, § 15, V.A.M.S. § 461.030, stating priority of right to administer a decedent's estate, as a general rule the probate court should appoint the widow as administratrix unless prohibited from acting by some rule of law.

State ex rel. Thompson v. Nortoni, 191 S.W. 429, 269 Mo. 562.

Mo.App. 1895. Within 30 days from decedent's death plaintiff applied for administration, claiming to be decedent's wife, and no notice of the application being taken she then filed a petition for the removal of administrators appointed less than 30 days after decedent's death and for the appointment of herself, which being denied, plaintiff prayed for an appeal, which was also denied. Rev. St. § 7, provides that letters of administration shall be granted, first, to the husband or wife; secondly, to those entitled to distribution of the estate. It is further provided that, if no such person apply for letters within 30 days after death of deceased, any suitable person may be appointed. *Held*, that mandamus would lie to compel the granting of the appeal.

State ex rel. Adamson v. Collier, 62 Mo. App. 38.

Mo.App. 1916. Widow *held* entitled to appointment as administratrix of husband's estate though wasteful and of immoral character.

State ex rel. Scanland v. Thompson, 187 S.W. 804, 196 Mo.App. 12.

Mo.App. 1920. In a proceeding involving right of alleged widow to be appointed administratrix, where it was claimed that marriage between her and deceased was during his last illness, when he was not mentally capable of understanding the marriage ceremony, *held*, that there was no error in appointing her as administratrix.

In re Guthery's Estate, 226 S.W. 626, 205 Mo.App. 664.

Mo.App. 1936. That deceased left minor children by a former wife who were interested in estate *held*, as a matter of law, not a disqualification of widow to serve as administratrix. Mo.St.Ann. §§ 6, 7, pp. 8, 9, V.A.M.S. §§ 461.030, 461.110.

State ex rel. Gregory v. Henderson, 88 S.W.2d 803, 230 Mo.App. 1.

⇐17(4). Guardian of infants or insane next of kin.

For cases from other jurisdictions, see other Key Number Digests.

⇐17 (5). Preference between kindred of same degree.

Mo. 1941. Though statute requires the probate court, in appointing an administrator to continue administration, to give preferential consideration to those entitled to distribution, it is not compelled to appoint either distributee but must exercise discretion, which cannot be controlled by those entitled to preference. Rev.St.1939, §§ 7, 47, Mo.St. Ann. §§ 7, 47, pp. 9, 29, V.A.M.S. §§ 461.030, 461.540.

State ex rel. Smith v. Hull, 152 S.W.2d 106, 348 Mo. 48, transferred 147 S.W. 2d 214.

⇐17 (6). Creditors.

Mo. 1939. Under statute providing that letters of administration can be granted at any time to any person deemed suitable if proof be made that no persons entitled to preference reside in Missouri, probate court could appoint a stranger as administrator of intestate's estate prior to expiration of 30 days after death of intestate, notwithstanding that distributees did not file a renunciation of their preference, where distributees were all nonresidents. Mo.St.Ann. §§ 6–10, pp. 8–12, V.A.M.S. §§ 461.030–461.050, 461.100, 461.110.

State ex rel. Pryor v. Anderson, 123 S.W. 2d 181, 343 Mo. 895, quashing mandamus 112 S.W.2d 857.

⇐17 (7). Nomination of third person by person within permissive degree of consanguinity.

Mo.App. 1894. Where an intestate who died without issue left a husband and a married sister, besides two brothers residing in foreign parts, and the husband renounced his right to be appointed administrator and requested the appointment of defendant, the removal of defendant on the ground that his appointment was made without the motion of any person interested in the estate and without any citation being issued to persons entitled to administer as next of kin was erroneous.

Kopper v. Coerver, 57 Mo.App. 71.

⇐18. Qualifications of administrator.

Rev.St.1845, p. 109, § 10, which provides that if at any time letters are regularly granted to any other person, the public administrator shall turn over the estate to the regularly appointed administrator, does not prevent the public administrator, having

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charge of an estate, from being appointed administrator in his private capacity; and, after he has been so appointed, and has duly qualified as such, he will hold the estate as a private, and not as a public, administrator.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1924. Rev.St.1919, § 11, V.A.M.S. § 461.060 providing that after the probate of a will letters testamentary shall be granted to the "persons" therein appointed executors, *held* not to include corporations, in view of sections 6, 7, 36, V.A.M.S. §§ 461.030, 461.110, 461.180.

State ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 257 S.W. 784, 302 Mo. 130, reversed State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 44 S.Ct. 427, 263 U.S. 361, 68 L.Ed. 339.

Mo.App. 1904. An administrator is not a public officer within the meaning of Const. art. 8, § 12, providing that no person shall be elected or appointed to any civil or military office who shall not have resided in this state one year next preceding his election or appointment.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1916. Under Rev.St.1909, § 15, V.A.M.S. § 461.030, widow, improvident, wasteful, without appreciation of value of money, of immoral character, etc., *held* entitled to appointment as administratrix of husband's estate, unless disqualified by section 14, V.A.M.S. § 461.110.

State ex rel. Scanland v. Thompson, 187 S.W. 804, 196 Mo.App. 12.

Mo.App. 1933. Where executor named in will predeceased testatrix, only resident entitled to participate in distribution of estate had absolute right to be appointed sole administratrix, unless judge believe she was not competent and suitable person for such office. Rev.St.1929, §§ 7, 11, V.A.M.S. §§ 461.030, 461.060.

State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

Where executor named in will predeceased testatrix, and there was only one resident entitled to participate in distribution of estate, only statutory discretion exercisable by special judge was whether such resident applicant was competent and suitable person to serve as administratrix. Rev.St.1929, §§ 7, 11, V.A.M.S. §§ 461.030, 461.060.

State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

⇐19. Renunciation of right to administer.

Mo. 1917. Rev.St.1909, § 14, V.A.M.S. § 461.110, states only the legal disqualifications which preclude appointment as administrator, but does not preclude waiver by contract or estoppel in pais of the right to be appointed administrator.

State ex rel. Thompson v. Nortoni, 191 S.W. 429, 269 Mo. 563.

Mo. 1944. Widow's renunciation of her right to administer estate of deceased husband was not a disqualification to act, but having renounced her right of priority she could not prevent the grant of letters thereafter to another by an exercise of right of preference or priority which she had waived by her renunciation. Mo.R.S.A. § 9, V.A.M.S. § 461.050.

Ross v. Pitcairn, 179 S.W.2d 35, 153 A.L.R. 215.

Widow's renunciation of her right to administer the estate of her deceased husband did not waive her right of appointment as administratrix on the revocation of letters of the previously appointed representative of decedent. Mo.R.S.A. § 9, V.A.M.S. § 461.050.

Ross v. Pitcairn, 179 S.W.2d 35, 153 A.L.R. 215.

Mo.App. 1894. Under Rev.St.1889, § 8, V.A.M.S. § 461.040, providing that, if no person entitled to administer as next of kin apply for letters within 30 days, the court may issue citation to him or them, on motion of any person interested, to appear and qualify within a certain time, and, if he or they fail to administer within that time, letters may be granted to any person whom the court deems suitable, a stranger may be appointed without citation, the only person in the state entitled to administer as next of kin having renounced his right.

Kopper v. Coerver, 57 Mo.App. 71.

Mo.App. 1896. Rev.St.1889, § 9, V.A.M.S. § 461.050, provides letters testamentary may be granted to a suitable person, if the person entitled to administer file his renunciation in writing with the clerk of the probate court. *Held*, that where, a few days before one started on an extended journey, he was informed that he had been named as executor in a will, and he wrote to the probate judge that he was just starting, and would be gone about two months, and that he presumed no administration would be necessary during his absence, such letter could not be construed as a renunciation.

In re Estes' Estates, 65 Mo.App. 38.

Mo.App. 1906. Where by an antenuptial contract a husband agreed not to control or

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claim any of his wife's property during her life or after her death, he thereby waived his right to appointment as her administrator given by Rev.St.1899, § 7, V.A.M.S. § 461.030.

In re Evans' Estate, 93 S.W. 922, 117 Mo. App. 629.

Mo.App. 1909. Under Rev.St.1899, § 7, Ann.St.1906, p. 341, V.A.M.S. § 461.030, requiring letters of administration to be granted first to the wife and next to one or more of those entitled to distribution, as the court believes will best manage the estate, and section 8, permitting letters to be granted to any person or persons deemed suitable if the persons entitled to preference file their renunciation in writing, the right to administer cannot be delegated, so that a renunciation by heirs cannot be made conditionally upon the appointment of one of their selection, and, when once made, cannot be recalled.

State ex rel. Burns v. Romjue, 118 S.W. 1188, 136 Mo.App. 650.

Mo.App. 1916. Party entitled to administer upon a decedent's estate may renounce the right, the statute so providing, and may do so by an antenuptial contract executed in consideration of marriage.

State ex rel. Scanland v. Thompson, 187 S.W. 804, 196 Mo. 12.

Antenuptial contract between decedent and widow, which merely awarded her $5,000 at marriage and $2,000 per year so long as she continued his wife, and thereafter "barred her from his property," was not a renunciation of her right as widow to administer his estate.

State ex rel. Scanland v. Thompson, 187 S.W. 804, 196 Mo. 12.

⇐20. Proceedings for appointment.

⇐20 (1). Nature of proceeding.

Mo. 1927. Proceeding for appointment of executor or administrator is in rem. Rev. St.1919, § 14; Laws 1923, p. 110, V.A.M.S. §§ 461.230, 461.440.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

⇐20(2). Time for application.

Mo.App. 1929. Appointment of administrator within 30 days after decedent's death and before those having preference to be appointed waived right *held* void. Rev.St.1919, §§ 7, 8, V.A.M.S. §§ 461.030, 461.040.

Pikey v. Riles, 20 S.W.2d 550, 223 Mo. App. 921.

⇐20(3). Persons entitled to make application.

For cases from other jurisdictions, see other Key Number Digests.

⇐20(4). Notice.

Mo.App. 1904. Rev.St.1899, § 7, V.A.M.S. § 461.030 provides for the grant of letters of administration, first to the husband or wife, and second to a distributee. Section 8 provides that if none of such persons apply for letters the court may issue a citation to them, on motion of any person interested, to appear and qualify, and, if they fail to do so, letters may be granted to any suitable person. Section 11 provides that if the persons appointed executors by will refuse to act or be disqualified, letters of administration shall be granted to the person to whom administration would have been granted if there had been no will. A nonresident died testate, leaving property in the state, upon which his wife and executors were disqualified, by reason of nonresidence, to administer. His brother, who was a legatee under the will, thereupon became a resident of this state, and applied for letters of administration. *Held* that, the brother having a prior right to administer on the property in this state, it was not necessary to give notice of his application to other persons interested in the estate.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

⇐20 (4½). Parties.

For cases from other jurisdictions, see other Key Number Digests.

⇐20 (5). Petition or bill.

Mo.App. 1945. Applicant for letters of administration was obligated to state addresses of deceased's heirs only to the best of her knowledge and belief. Mo.R.S.A. § 15, V.A.M.S. § 461.230.

Sutter v. Cavalier, 185 S.W.2d 304.

⇐20(5½)-20(7).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐20 (8). Trial or hearing.

Mo.App. 1904. The determination of the qualifications of an applicant for letters of administration to properly manage the estate is a matter within the discretion of the probate court, which it may decide without any trial or hearing.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1936. Finding that person having prior right to administer estate is not a competent or suitable person must be clear and unequivocal to warrant probate court's disqualification of that person. Mo.St.Ann. § 7, p. 9, V.A.M.S. § 461.030.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

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Person entitled under statute to preference in appointment as administrator cannot be refused appointment without opportunity for hearing on question of his competency and suitability. Mo.St.Ann. § 7, p. 9, V.A.M.S. § 461.030.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

⇐20(8½). Vacation appointment.

For cases from other jurisdictions, see other Key Number Digests.

⇐20(9). Order of appointment.

Mo. 1927. Decision respecting decedent's residence is essential part of order appointing administrator. Rev.St.1919, § 4, V.A.M.S. § 461.010.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1924. A court order in term time, confirming one made during vacation granting letters of administration to deceased's widow, rendered the former order valid ab initio.

Eulinberg v. Quick Payment Old Line Life Ins. Co., 261 S.W. 725.

Mo.App. 1936. Probate court order appointing widow and another as coadministrators of decedent's estate after widow agreed to appointment of coadministrator could not be amended nunc pro tunc to show that widow had been found incompetent to serve alone, where no mistake was made in entering order. Mo.St.Ann. § 7, p. 9, V.A.M.S. § 461.030.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

⇐20(10). Review.

Mo. 1929. Certiorari *held* proper, where probate court exceeded jurisdiction in appointing administrator in place of executrix.

State ex rel. Barlow v. Holtcamp, 14 S.W. 2d 646, 322 Mo. 258.

Mo. 1936. Order appointing administrator *held* not appealable. Mo.St.Ann. § 284, p. 177, V.A.M.S. § 467.010.

Lucitt v. Toohey's Estate, 89 S.W.2d 662, 338 Mo. 343.

Mo.App. 1905. An order refusing to appoint intestate's son as his administrator is not appealable; mandamus being the proper remedy to enforce the statutory right to priority.

In re Flick's Estate, 117 S.W. 93, 136 Mo.App. 164.

Mo.App. 1909. Where the appointment of an administrator on renunciation by heirs of their right to administer was made in the exercise of sound judgment, it will not be disturbed by the appellate court.

State ex rel. Burns v. Romjue, 118 S.W. 1188, 136 Mo.App. 650.

Mo.App. 1910. An order refusing to appoint intestate's son administrator on his application is not appealable.

State ex rel. Flick v. Reddish, 129 S.W. 53, 148 Mo.App. 715.

Mo.App. 1912. In view of Rev.St.1909, § 289, V.A.M.S. § 467.010, an appeal does not lie from an order refusing to appoint an administrator.

Marshall v. Shoemaker's Estate, 144 S.W. 1120, 164 Mo.App. 429.

Mo.App. 1940. In proceeding for issuance of letters of administration wherein an appeal was taken to the circuit court after the probate court overruled motion to set aside appointment theretofore made, where there was no controversy over the facts, circuit court was not required to file separate findings of fact and conclusions of law. Mo. St.Ann. § 952, p. 1225, V.A.M.S. § 510.310.

In re Helm's Estate, 136 S.W.2d 427.

Mo.App. 1945. In absence of anything to the contrary, Court of Appeals would presume that probate court, having full knowledge of amount of public administrator's bond then on file, believed it to be sufficient to secure proper performance of duties of an administrator pendente lite by public administrator without requiring him to file a special bond as administrator pendente lite. Mo.R.S.A. §§ 295, 300; 299, subd. 9, V.A.M.S. §§ 461.780, 461.820, 461.840.

Stobie v. Stobie, 183 S.W.2d 609.

⇐20(11)-20(12).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐21. Administrator with will annexed.

⇐21(1). In general.

Mo. 1857. An executor whose appointment is avoided by his being an attesting witness may be appointed administrator with the will annexed.

Murphy v. Murphy, 24 Mo. 526.

⇐21(2). Proceedings for appointment.

Mo.App. 1945. An order of probate court denying petition of one to be appointed as successor executor or to have letters of administration cum testamento annexo issued to him was not an order from which an appeal could be taken to circuit court,

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and hence Court of Appeals had no jurisdiction. Mo.R.S.A. § 283, V.A.M.S. § 467.010.
Stobie v. Stobie, 183 S.W.2d 609.

⇐22. Temporary or special appointment.

⇐22(1). In general.

Mo. 1874. The authority under Wag.St. p. 72, § 13, to suspend the functions of an executor during a contest of the will in the circuit court, and appoint a temporary administrator pendente lite, includes an administrator c. t. a.
Lamb v. Helm, 56 Mo. 420.

The provision in Wag.St. p. 22, § 13, that "letters shall be granted during the time of such contest, minority, or absence, to some other person," means to some disinterested person, and must not be construed with section 6, which refers to the appointment of a general, and not of a special, administrator, to give any preference to the widow.
Lamb v. Helm, 56 Mo. 420.

Mo. 1912. Rev.St.1909, § 21, V.A.M.S. §§ 461.080, 461.090, which provides for the appointment of an administrator in will contests effective during the time of such contest, includes the time during which an appeal is pending.
State ex rel. Ashton v. Imel, 147 S.W. 989, 243 Mo. 180.

Mo. 1929. When validity of will was established in contest, executrix was entitled to possession of assets of estate in hands of administrator pendente lite on producing evidence of judgment establishing will. Rev. St.1919, § 13, V.A.M.S. §§ 461.080, 461.090.
State ex rel. Barlow v. Holtcamp, 14 S.W.2d 646, 322 Mo. 258.

On executrix's motion for order directing administrator pendente lite to turn over assets after will contest, order appointing another administrator without complying with statute *held* void. Rev.St.1919, § 42, V.A.M.S. § 461.500.
State ex rel. Barlow v. Holtcamp, 14 S.W. 2d 646, 322 Mo. 258.

Mo. 1943. Under statute authorizing appointment of an administrator pendente lite where executors are interested in contest of will, the probate court has a discretion as to whether an administrator shall be appointed. Mo.R.S.A. § 14, V.A.M.S. § 461.090.
Odom v. Langston, 173 S.W.2d 826, 351 Mo. 609, transferred 170 S.W.2d 589, 237 Mo.App. 721, transferred 159 S.W. 2d 686.

Mo.App. 1896. Rev.St.1889, § 13, V.A.M. S. §§ 461.080, 461.090, provides that, if an executor be absent from the state, letters of administration shall be granted during the time of such absence to some other person; and section 9 provides that letters testamentary may be granted to a suitable person, if the person entitled to administer file his renunciation in writing with the clerk of the probate court. *Held* that, where one is appointed under section 13 because of the absence of the executor from the state, he is only entitled to control the estate during the executor's absence.
In re Estes' Estate, 65 Mo.App. 38.

Mo.App. 1909. Rev.St.1899, § 13, Ann.St. 1906, p. 342, V.A.M.S. §§ 461.080, 461.090, provides that, if the validity of a will is contested, letters shall be granted pending the contest. *Held*, that though in a will contest the original petition named as defendants only the named legatees, instead of all heirs, a temporary appointment was not prejudicial to the executor, also a legatee; an amended petition making all the heirs parties being subsequently filed.
Achor v. Sullenger, 117 S.W. 1191, 137 Mo.App. 372.

Mo.App. 1932. Appointment of administrator pendente lite only suspends activities of executor until final decision, unless will is found to be invalid. Rev.St.1929, §§ 13, 14, V.A.M.S. §§ 461.080, 461.090.
In re Roff's Estate, 50 S.W.2d 156, 226 Mo.App. 1203, transferred Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113.

Mo.App. 1945. Under statute, appointment of an administrator pendente lite upon filing of a will contest is discretionary with probate court. Mo.R.S.A. § 14, V.A.M.S. § 461.090.
Stobie v. Stobie, 183 S.W.2d 609.

⇐22 (2). Grounds for appointment.

Under Wag.St. p. 1368, § 29, which provides that, if the validity of a will be contested, letters of administration shall be granted during the time of such contest to some other person, in case of proceedings in the circuit court to contest the validity of the will the probate court may suspend the functions of the executor named in the will, and appoint an administrator pendente lite.
Mo. 1873. Rogers v. Dively, 51 Mo. 193.
Mo. 1874. Lamb v. Helm, 56 Mo. 420.

Mo. 1896. Under Rev.St.1889, § 13, V.A. M.S. §§ 461.080, 461.090, providing that, if a will be contested, letters of administration shall be granted to some person, who shall take charge of the estate during the time of such contest, the probate court has jurisdiction to suspend an executor and appoint a

temporary administrator, pending a contest of the will in the circuit court.

State ex rel. Alderson v. Moehlenkamp, 34 S.W. 468, 133 Mo. 134.

Mo. 1919. Rev.St.1909, § 21, V.A.M.S. §§ 461.080, 461.090, as to appointment of temporary administrator during will contest, and section 555, providing for contest of will in circuit court, must be construed in pari materia.

Johnson v. Brewn, 210 S.W. 55, 277 Mo. 392.

Where contest of probate of will is brought in the circuit court, under Rev.St. 1909, § 555, V.A.M.S. § 468.580 which action revokes the will and letters testamentary, it is the duty of the probate court under section 21 to appoint a temporary administrator.

Johnson v. Brewn, 210 S.W. 55, 277 Mo. 392.

Mo. 1931. Will contest does not authorize probate court to terminate authority of executor whose appointment has been confirmed, but only to appoint disinterested person administrator pendente lite. Rev.St. 1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Mo. 1951. Appointment of administrator during pendency of will contest, if executor named in will has interest adverse to contestant, is within sound discretion of probate court. V.A.M.S. § 461.090.

Schupbach v. Fisler, 239 S.W.2d 502, 362 Mo. 35.

Mo. 1952. Claim for fees for legal services rendered by executrix' attorney, who was also one of trustees under testamentary trust created by will but who was not executor or administrator of estate, was not a "demand", within meaning of statute authorizing appointment of administrator ad litem when qualified executrix or administratrix seeks to establish a "demand" against estate. V.A.M.S. § 464.230.

In re Schield's Estate, 250 S.W.2d 151.

Where executrix, due to her belief in legality and reasonableness of the fee, was not in position to defend estate against allowance of attorney's fee for services rendered to estate by lawyer, who was also one of trustees of testamentary trust created by decedent's will, Probate Court was empowered to appoint administrator ad litem to represent estate on appeal from order disallowing fee because of possibility of conflicting interests and because fee was deemed excessive. Rules of Supreme Court, rule 4.06.

In re Schield's Estate, 250 S.W.2d 151.

Mo.App. 1911. An administrator may assume the attitude of a mere creditor against his decedent's estate without forfeiting his office, and, where he presents a claim, the court must as required by statute appoint a suitable person to represent the estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

Mo.App. 1932. Appointment of administrator pendente lite, where there was will contest and executor was legatee, rested in discretion of probate court, subject to correction only for abuse. Rev.St.1929, §§ 13, 14, V.A.M.S. §§ 461.080, 461.090.

In re Roff's Estate, 50 S.W.2d 156, 226 Mo.App. 1203, transferred Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113.

⇐22(3). Proceedings for appointment.

Mo. 1922. Where the probate court allowed an appeal to the circuit court from an order appointing a temporary administrator, and the circuit court had jurisdiction of the parties who appeared before it, it also had jurisdiction over the subject-matter under Rev.St.1919, § 2436, cl. 4, and section 2542, V.A.M.S. §§ 478.070, 481.020, even though the probate court committed error in granting the appeal and the circuit court erred in hearing it on its merits, so that the circuit court's judgment cannot be collaterally attacked. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Rev.St.1919, § 2436, cl. 4, V.A.M.S. § 478.070, giving the circuit courts appellate jurisdiction from the judgments and orders of probate courts in all cases not expressly prohibited by law, authorizes an appeal to the circuit court from the probate court from an order appointing a temporary administrator. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo. 1925. Probate court had jurisdiction to grant an appeal from judgment appointing administrator pendente lite and suspending executor.

State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

Determination of probate court whether will contest proceeding is pending in circuit court is one of both law and fact.

State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

Determination of probate court that will contest proceeding is pending in circuit court must be a hearing on the evidence.

State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

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Act of probate court in granting appeal to circuit court in proceedings to probate will *held* properly reviewed by certiorari.
State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

Hearing is had de novo in circuit court on appeal from decision of probate court appointing administrator pendente lite.
State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

⇐23. Second or additional appointment.

Mo.App. 1933. One who is not competent and suitable person to act as administratrix alone is also incompetent and unsuitable to serve with another. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.
State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Person who is entitled to priority to administer on estate cannot be forced to accept coadministrator. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.
State ex rel. Fansher v. Guinotte, 58 S. W.2d 1005, 227 Mo.App. 902.

Where person is entitled to serve as administrator, appointment of another as joint administrator infringes his right of statutory priority. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.
State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

When court determined that person entitled to priority was competent and suitable person to act as administratrix, appointment of another as coadministrator was void. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.
State ex rel. Fansher, v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

Mo.App. 1936. Where probate court appointed widow as administratrix of decedent's estate, portion of order attempting to appoint trust company coadministrator was unauthorized, notwithstanding findings as to widow's youth and lack of business experience and need for protecting interests of children by a former wife. Mo.St.Ann. § 7, p. 9, V.A.M.S. § 461.030.
State ex rel. Gregory v. Henderson, 88 S.W.2d 693, 230 Mo.App. 1.

⇐24. Public administrators.

C.C.A.Mo. 1914. Where an employé was killed, leaving a mother, brothers, and sister unknown to the public administrator, and no attempt was made to enforce a claim for wrongful death until a fourth of the time limited therefor had expired, the public administrator was authorized to take charge of the estate under Rev.St.Mo.1909, § 302, Mo. St.Ann. § 299, p. 189, V.A.M.S. § 461.820.
American Car & Foundry Co. v. Anderson, 211 F. 301, 127 C.C.A. 587.

Mo. 1846. A county court may order the public administrator to take possession of any estate where administration has not been taken out under the general law.
Callahan v. Griswold, 9 Mo. 784.

Mo. 1866. The special act of March 3, 1857, providing for the election of public administrators in certain counties, including St. Louis, was not repealed by the general statute of 1865, Rev.Code 1865, p. 515, § 1, authorizing the appointment of a public administrator by each court having probate jurisdiction.
State ex rel. Vastine v. McDonald, 38 Mo. 529.

Mo. 1882. Wag.St. p. 122, § 8, making it the duty of the public administrator to take in his charge the estate of deceased persons in his county in specific instances, does not authorize the public administrator to take charge of property brought into the state from another state by the executor of a testator dying in the other state, where his estate was administered and the executor discharged; the public administrator being restricted in his power, so as to be empowered to take charge only of property in his county at the time of the death of the decedent.
McCabe v. Lewis, 76 Mo. 296.

Mo. 1892. Under Rev.St.1889, § 299, V. A.M.S. § 461.820, making it the duty of the public administrator to take charge of the estate of deceased persons in certain specified cases, the public administrator, in taking charge of such estates, acts independently of any order of the probate court.
Leeper v. Taylor, 19 S.W. 955, 111 Mo. 312.

Mo. 1901. Where a public administrator was re-elected to the office, and qualified therefor, he became his own successor as guardian of an estate administered by him during his first term, and there was no necessity of a special order of the probate court, after his reelection, to take charge of such estate, in order to charge him and his sureties for his second term of office.
State ex rel. Gordon v. Kennedy, 63 S.W. 678, 163 Mo. 510.

The word "papers," in Rev.St.1899, § 292 (laws of administration), V.A.M.S. § 467.090, declaring it to be the duty of a public administrator to take into his charge and custody the estates of all deceased persons "in the following cases: * * * When money, property, papers or other estate are left in a

situation exposed to loss or damage, and no other person administers on the same," refers to papers constituting the assets or a part of the assets of the estate; that is, papers in which there is a property value.

Mo. 1906. Richardson v. Busch, 95 S.W. 894, 198 Mo. 174, 115 Am.St.Rep. 472.

Mo. 1906. De La Vergne v. Richardson, 95 S.W. 898, 198 Mo. 189.

Mo. 1916. Subject to Rev.St.1909, § 15, V.A.M.S. § 461.030, declaring priority of persons entitled to administer estates, and section 19, § 461.060, prescribing when letters testamentary with will annexed shall issue, it is within the discretion of the court to appoint the administrator, and the public administrator has no superior right to the appointment.

Brinckwirth's Estate v. Troll, 181 S.W. 403, 266 Mo. 473.

Mo. 1919. Where one dying in another state left an estate in Missouri, the public administrator is entitled to take possession under Rev.St.1909, § 302, cl. 4, V.A.M.S. § 461.820, for estate's protection, whether deceased had creditors in the state or not.

Troll v. Third Nat. Bank of St. Louis, 211 S.W. 545, 278 Mo. 74.

Rev.St.1909, § 302, cl. 4, V.A.M.S. § 461.820, giving the public administrator power to take possession of a decedent's estate for its protection, gives him the right to take charge of the property of one dying in another state, whether intestate or testate.

Troll v. Third Nat. Bank of St. Louis, 211 S.W. 545, 278 Mo. 74.

Bank stock left by a deceased is capable of being exposed to loss so as to authorize the public administrator to take possession for estate's protection.

Troll v. Third Nat. Bank of St. Louis, 211 S.W. 545, 278 Mo. 74.

Under Rev.St.1909, § 302, cl. 4, V.A.M.S. § 461.820, public administrator had the right to demand and take possession of stock of bank domiciled in Missouri owned by nonresident decedent, though certificates were in possession of executor duly appointed in other state wherein decedent resided and was domiciled and had certificates at time of her death; the situs of the stock being in state in which bank is domiciled.

Mo. 1919. Troll v. Third Nat. Bank, 216 S.W. 922.

Mo. 1919. Troll v. National Bank of Commerce in St. Louis, 216 S.W. 923.

Mo. 1919. Troll v. United Rys. Co. of St. Louis, 216 S.W. 923.

Mo. 1925. Though only distributees entitled to preference in appointment are minors, appointment of public administrator within 35 days illegal.

In re Allen's Estate, 271 S.W. 755, 307 Mo. 674.

Public administrator *held* not subject to appointment within 35 days after deceased's death.

In re Allen's Estate, 271 S.W. 755, 307 Mo. 674.

Mo. 1933. Public administrator should not be permitted to choose only lucrative estates and reject those that offer no hope of pecuniary compensation.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

Mo. 1940. The enactment of the statute relating to administration of personal property of nonresident decedents limited the situations in which a public administrator could exercise his authority over estates of nonresident decedents. Mo.St.Ann. § 273, p. 172, V.A.M.S. § 466.010.

Sheehan v. First Nat. Bank, 140 S.W.2d 1, 346 Mo. 227.

Mo.App. 1879. An appeal lies from an order of the probate court refusing to revoke the letters of a public administrator, under Wag.St. p. 119, § 87, permitting an appeal from "all orders revoking letters testamentary or of administration," though no letters are in fact granted to a public administrator.

Donaldson v. Lewis, 7 Mo.App. 403.

Mo.App. 1881. General provisions of the administration law and special provisions in regard to the public administrator are not in pari materia.

State, to Use of Lewis, v. Wolff, 10 Mo. App. 95.

Mo.App. 1887. Under Rev.St.1879, § 306, requiring the public administrator to take into his charge and custody the estates of all deceased persons in his county, when a stranger dies intestate in the county without relations, the public administrator cannot take charge of such an estate, when an administrator has been appointed on the nomination of a nonresident heir, under Rev.St. 1879, § 8.

Tittman v. Edwards, 27 Mo.App. 492.

Mo.App. 1890. There is no question as to the power of the probate court, under Rev.St.1879, § 306, to order an estate into the hands of the public administrator, when in its judgment good cause exists to prevent its being "injured, wasted, purloined, or lost."

Becraft v. Lewis, 41 Mo.App. 546.

Mo.App. 1898. Rev.St.1889, § 43, V.A.M.S. § 461.510, permits an executor or adminis-

trator to resign for good cause; section 300 confers on public administrators the same powers as are given executors or administrators generally; section 301 provides that, when a public administrator has been appointed to take charge of an estate, he shall conduct the administration until finally settled, "unless he resigns, dies, or is removed," etc.; and section 305 authorizes the probate court to order public administrators to account for property at any time for good cause shown. *Held* that, where a public administrator resigned, he was incapacitated from continuing the administration of the estate committed to his care as such administrator, and the probate court might order him to account to his successor.

State ex rel. Gordon v. Kennedy, 73 Mo. App. 384.

Rev.St.1889, § 43, V.A.M.S. § 461.510, permits an executor or administrator to resign for good cause; section 300 confers on public administrators the same powers as are enjoined on executors or administrators generally; section 301, § 461.890, provides that, when a public administrator has been appointed to take charge of an estate, he shall conduct the administration until finally settled, "unless he resigns, dies, or is removed," etc.; and section 305, § 461.880, authorizes the probate court to order public administrators to account for property at any time for good cause shown. *Held*, that the word "resigned" did not have reference to his resigning his appointment by the probate court to take charge of a particular estate, as a public administrator has no authority to refuse to act as to any particular estate committed to his care.

State ex rel. Gordon v. Kennedy, 73 Mo. App. 384.

Mo.App. 1901. A public administrator is a public officer, who is presumed to have acted correctly and within the purview of his statutory authority.

Vermillion v. Le Clare, 89 Mo.App. 55.

Mo.App. 1903. Where the public administrator takes charge of an estate of a person dying intestate, without known heirs, under Rev.St.1899, § 292, V.A.M.S. § 461.820, making it his duty so to do, and files notice of the fact in the office of the probate clerk, as required by section 295, § 461.850, no appointment by the probate court is required to invest him with his office.

In re Hill's Estate, 77 S.W. 110, 102 Mo. App. 617.

Mo.App. 1906. Rev.St.1899, § 292, V.A.M.S. § 461.820, makes it the duty of the public administrator to take charge of the property of any intestate left in the county, and liable to injury or loss, when intestate does not leave a known husband, widow, or heirs in the state. Section 7 provides that letters of administration shall be granted, first, to the husband or wife; secondly, to those entitled to distribution of the estate, and section 8 provides that when no such person applies for letters after a specified time after the death, the court may issue a citation to him on motion of any person interested, to appear and qualify, and that if the person fails to administer within the time appointed letters may be granted to any person deemed suitable. *Held*, that where a nonresident died intestate, leaving property in a county and as his only heir a resident of the state, but neither the public administrator of the county where the property was situated, nor the probate court had knowledge of such fact, the granting of letters to the public administrator was not improvident though no citation was issued as provided by section 8.

Hollingsworth v. Jeffries, 97 S.W. 632, 121 Mo.App. 660.

Mo.App. 1913. Despite Rev.St.1909, §§ 302, 305, V.A.M.S. §§ 461.820, 461.850, authorizing the public administrator to enter upon his duties by the mere filing of a notice with the clerk of the probate court, *held* that, under section 10, an order of the probate court denying administration upon the estate of claimant's deceased wife and awarding him possession is binding until set aside, and the administrator is not entitled to custody upon the mere filing of a schedule.

Nelson v. Troll, 156 S.W. 16, 173 Mo.App. 51.

Mo.App. 1914. Rev.St.1909, § 302, V.A.M.S. § 461.820, enumerating the cases in which a public administrator may act, excludes all other cases.

In re Landgraf's Estate, 168 S.W. 268, 183 Mo.App. 251.

A public administrator cannot, under Rev.St.1909, § 302, V.A.M.S. § 461.820, take possession of choses in action belonging to the estate of a nonresident on the ground that the property is liable to be lost or wasted, where the heirs of the nonresident were collecting the debts evidenced by the choses in action.

In re Landgraf's Estate, 168 S.W. 268, 183 Mo.App. 251.

A public administrator is not entitled to take possession as ancillary administrator, over the objections of the distributees, of choses in action belonging to the estate of a nonresident who left no debts within the jurisdiction.

In re Landgraf's Estate, 168 S.W. 268, 183 Mo.App. 251.

Mo.App. 1927. Record *held* to show public administrator was appointed in public not private capacity. Rev.St.1919, § 296, V.A.M.S. § 461.820.

In re White's Estate, 295 S.W. 504, 221 Mo.App. 984.

Mo.App. 1938. On proof that none of a widower's distributees resided in the state, the probate court was entitled by statute to grant letters of administration to any suitable person, such as the public administrator, "at any time," which would include the day of the intestate's death, without any citation to or renunciation by such nonresidents. Mo.St.Ann. §§ 7–10, 15, 38, 299, pp. 9–12, 17, 26, 189, V.A.M.S. §§ 461.030–461.050, 461.100, 461.190, 461.230, 461.820.

State ex rel. Pryor v. Anderson, 112 S.W. 2d 857, mandamus quashed 123 S.W. 2d 181, 343 Mo. 895.

The public administrator, having taken the oath and made application for appointment as administrator of the estate of a deceased widower theretofore under guardianship as a person of unsound mind, was properly appointed administrator, where it was proved that none of the distributees resided in the state, and where the letters of administration recited in statutory form that the intestate left property which might be lost, destroyed, or diminished in value. Mo.St. Ann. §§ 7–10, 15, 38, 299, 495, pp. 9–12, 17, 26, 189, 299, V.A.M.S. §§ 458.550, 461.030–461.050, 461.100, 461.190, 461.230, 461.820.

State ex rel. Pryor v. Anderson, 112 S.W. 2d 857, mandamus quashed 123 S.W. 2d 181, 343 Mo. 895.

Though one of the intestate's distributees, all of whom were nonresidents of the state, had the right to return to the state, as she did 59 days after the intestate's death, for the sole purpose of qualifying as administratrix, such subsequent conduct did not invalidate the prior appointment of the public administrator, where such appointment, though made on the day of the intestate's death, was not improvident or void when made. Mo.St.Ann. §§ 7–10, 299, pp. 9–12, 189, V.A.M.S. §§ 461.030–461.050, 461.100.

State ex rel. Pryor v. Anderson, 112 S.W. 2d 857, mandamus quashed 123 S.W. 2d 181, 343 Mo. 895.

Mo.App. 1945. Probate court did not abuse its discretion in appointing public administrator to take charge of testator's estate upon testator's son by his first marriage filing a will contest, instead of appointing testator's second wife who was named executrix in will to take charge of estate pending the will contest, where probate court on ample evidence found that second wife had an interest adverse to contestant of the will. Mo.R.S.A. § 14, V.A.M.S. § 461.090.

Stobie v. Stobie, 183 S.W.2d 609.

⇐25. Acceptance and oath of office.

For cases from other jurisdictions, see other Key Number Digests.

⇐26. Bond.

⇐26 (1). Of executors.

Mo. 1878. In a suit against the sureties on the bond of an executor, the defense that the several sureties "signed the bond on the parol agreement made at the time by the executor that he would procure other additional securities and give defendants an indemnity bond" was without merit.

State ex rel. Wight v. Modrel, 69 Mo. 152.

Mo. 1882. The condition of an executor's bond pursued the language of the statute, declaring that an executor's bond shall be conditioned to faithfully administering the estate, "account for, pay, and deliver all money, * * * and perform all other things touching said administration required by law, or the order or decree of any court having jurisdiction," except that the words "or the order or decree of any court having jurisdiction" were omitted, and the words "touching such executorship" were substituted for the words "touching said administration." *Held*, that the bond was a statutory bond, whether sections 18 and 19 of the administration act were applicable to an executor.

Newton v. Cox, 76 Mo. 352.

Mo. 1912. That executors' bond was not in fact executed before the probate judge as required by Rev.St.1909, § 29, V.A.M.S. § 461.360, *held* no defense to the sureties.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo. 1951. Compliance by trust company with statute permitting such company, upon compliance with statute requirements, to qualify as fiduciary without giving bond as such takes place of bond in every case in which trust company is named as executor, but matter of giving bond of office, by trust company which has not complied with that statute, must be determined in each particular case in which such company has been named as executor on same basis as though natural person, had been so named. V.A. M.S. §§ 363.170, 363.200.

State ex rel. North St. Louis Trust Co. v. Stahlhuth, 239 S.W.2d 515, 362 Mo. 67.

Where trust company, which has not complied with statute permitting it to quali-

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fy as fiduciary without giving bond as such, is nominated to be executor by will, it is entitled to qualify under same circumstances as natural persons so appointed, and therefore, if nothing is mentioned about executor's bond, it must give bond as required by statute, but, if will requests that executor shall not be required to give bond, probate court may issue letters without requiring bond or may in its discretion require bond. V.A.M.S. §§ 363.170, 363.200.

State ex rel. North St. Louis Trust Co. v. Stahlhuth, 239 S.W.2d 515, 362 Mo. 67.

It was proper for trust company, named as executor by will, to make application for letters testamentary without giving bond, and such application was sufficient for court to act upon, either by issuing letters without requiring executor's bond or by determining, in its discretion, to require bond, notwithstanding fact that executor named in will was trust company which had not complied with statute permitting trust companies to qualify as fiduciaries without giving bonds. V.A.M.S. §§ 363.700, 461.260–461.280, 461.300.

State ex rel. North St. Louis Trust Co. v. Stahlhuth, 239 S.W.2d 515, 362 Mo. 67.

Mo.App. 1877. The fact that a surety on an executor's bond was informed by those interested in procuring his signature thereto that it would also be signed by another responsible surety will not release him, on failure to procure such signature; it not appearing that the surety delivered the bond merely as an escrow, and that it was fraudulently delivered without his consent, or that there was any positive agreement or condition that it should not be delivered as his bond, until also signed by another as surety.

Wolff v. Schaeffer, 4 Mo.App. 367.

⇐26 (2). Of administrators.

The approval of an administrator's bond by the probate court is not essential to its validity.

Mo. 1846. Henry v. State, to Use of Russell, 9 Mo. 778.

Mo. 1873. State, to Use of Burrough, v. Farmer, 54 Mo. 439.

Mo. 1878. State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1879. Brown v. Weatherby, 71 Mo. 152.

Mo. 1852. If the given name of the deceased is left out of the bond, but inserted in the letters, there is a sufficient description by which the estate meant by the parties can be ascertained; and the letters, the bond referring to them, may be produced to explain the ambiguity.

State, to Use of Renfro's Adm'rs, v. Price, 15 Mo. 375.

Mo. 1855. Under the administration act, Rev.Code 1845, it is not necessary that an administration bond should be approved by the county court before the property vests in the administrator. Wherever the law requires a bond to be approved, that bond will be binding until it is disapproved, unless it is otherwise expressly declared.

James v. Dixon, 21 Mo. 538.

Mo. 1878. Where an administrator, after giving one bond, subsequently and of his own motion executed another one, with different sureties, it was not necessary to the validity of the latter that it should have been approved by the probate court.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1879. Where the bond of a public administrator was, after being signed, placed by him in the desk in the office of the judge of probate under the latter's control, and the administrator thereupon entered on the discharge of his duties, there was a sufficient delivery and acceptance of the bond.

Brown v. Weatherby, 71 Mo. 152.

Mo. 1922. The giving of the statutory bond required upon the issuance of letters by Rev.St.1919, § 17, V.A.M.S. § 461.260, which is expressly made applicable by section 19, § 461.280, to one who administers pending the contest of a will, is a condition precedent to taking over the estate, so that an allegation that the temporary administrator had never executed the bond is a defense to a suit by him for his compensation. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo.App. 1918. Where one was public guardian by virtue of being public administrator, and at the termination of his office a new bond was given for him as guardian and curator "in his private capacity," such bond was not an "additional" bond to guarantee the faithful performance of his duty as public administrator.

State ex rel. and to Use of Short v. Hardy, 206 S.W. 904, 200 Mo.App. 405.

Mo.App. 1926. Adopting father of decedent *held* not an "heir or other person interested in estate" under statute so as to require administrator to file new bond. Rev.St.

1919, § 26; Rev.St.1909, § 1673, V.A.M.S. § 461.380.

Lasswell v. McFarland, 284 S.W. 843, 219 Mo.App. 665.

Court cannot of its own motion, in proceeding under statute by adopting father of decedent as alleged heir, enter order increasing administrator's bond. Rev.St.1919, §§ 17, 26, 31, V.A.M.S. §§ 461.260, 461.370, 361.380.

Lasswell v. McFarland, 284 S.W. 843, 219 Mo.App. 665.

Mo.App. 1941. A distributee or beneficiary of an estate is a "person interested in the estate" within meaning of statutes respecting right of persons interested in an estate to institute proceedings to require administrator to give additional bond and providing that executor or other person interested in an estate may file an affidavit in the proper court stating that affiant has good cause to believe that a person has concealed or embezzled goods of deceased, and that certain proceedings may be instituted by any person interested in the estate. Rev.St.1939, §§ 27, 63, 67, Mo.St.Ann. §§ 27, 63, 67, pp. 22, 38, 43, V.A.M.S. §§ 461.380, 462.400 462.440.

In re Main's Estate, 152 S.W.2d 696, 236 Mo.App. 88, transferred 146 S.W.2d 597.

Mo.App. 1945. Where public administrator was appointed as administrator pendente lite in will contest, if any heir or interested party was of opinion that public administrator's bond was not sufficient, he should have applied to probate court to require additional security. Mo.R.S.A. §§ 295, 300; § 299, subd. 9, V.A.M.S. §§ 461.780, 461.840.

Stobie v. Stobie, 183 S.W.2d 609.

⇐27. Issuance of letters.

Mo. 1827. Letters of administration cannot be granted by a deputy clerk in his own name.

Stewart v. Cave, 1 Mo. 752.

Mo. 1831. If letters of administration purport to be granted by proper authority, and are in due form and sealed with the office seal of the county court, they will be good, without the signature of the clerk, until set aside for want of formality.

Post v. Caulk, 3 Mo. 35.

Mo. 1855. The order of a county court is a sufficient appointment of an administrator, without any formal letters, if the party give the bond and take the oath required by law.

State, to Use of Moore, v. Price, 21 Mo. 434.

Mo. 1872. The failure of an administrator to file a notice of the fact of his administering on an estate, as required by the statute, Wag.St. p. 122, § 13, will not invalidate his acts.

Adams v. Larrimore, 51 Mo. 130.

Mo. 1876. Where it is shown that letters of administration were granted, it will be presumed, in the absence of a showing to the contrary, that they conformed to the requirements of the statute.

Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

Mo. 1893. Letters of administration issued in vacation are not limited in point of time to the succeeding term, and are valid until rejected by the court.

Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo.App. 1892. Rev.St.1889, §§ 87–89, V.A.M.S. §§ 461.450–461.470, providing for proof showing the giving of the notice of granting of letters of administration, declaring that the affidavit of the publication of the newspaper spread on the probate records shall be received in evidence in all courts of the state, do not exclude other competent evidence of the fact of the giving of such notice.

Dingle v. Pollick, 49 Mo.App. 479.

⇐28. Evidence of appointment or authority.

Mo.App. 1916. Under Gen.St.Kan.1905, § 5320, in widow's action for death of husband, her statement that no letters of administration were taken out, and, when asked how she knew that, that she had never looked or inquired, but had never heard of any, was insufficient to show that there was no administrator.

McGinniss v. Kansas City Western Ry. Co., 192 S.W. 115, 195 Mo.App. 390.

⇐29. Operation and effect of appointment.

⇐29(1). In general.

Mo. 1892. Though the facts did not exist to justify a public administrator in taking charge of the estate, he would be the administrator until superseded by a duly appointed private administrator.

Leeper v. Taylor, 19 S.W. 955, 111 Mo. 312.

Mo.App. 1914. One acting as administrator under a valid appointment, good until set aside, has a qualified title to the assets, and he holds the property as trustee for those entitled to share therein.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

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Mo.App. 1933. Appointment of person as coadministratrix *held* to show that court decided that she was competent and suitable person to serve. Rev.St.1929, §§ 7–11, V.A.M.S. §§ 461.030–461.060, 461.100.

State ex rel. Fansher v. Guinotte, 58 S.W.2d 1005, 227 Mo.App. 902.

Mo.App. 1934. Appointment of stranger to deceased as administrator, made four days after death and without daughter's written waiver of her right to appointment or written consent to appointment of another, *held* void, and probate court's allowance of claim for burial expenses made on administrator's certificate of correctness was of no effect. Mo.St.Ann. §§ 7–9, pp. 9, 11, 12, V.A.M.S. §§ 461.030–461.050.

In re Graves' Estate, 73 S.W.2d 844.

Mo.App. 1936. Order appointing widow and trust company as coadministrators of decedent's estate as matter of law constituted finding that widow was competent and suitable person to administer estate. Mo.St.Ann. § 7, p. 9, V.A.M.S. § 461.030.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

⇐29(2). Collateral attack in general.

C.C.A.Mo. 1914. An application to revoke the authority of a public administrator prospectively *held* a collateral attack on his appointment and unsustainable.

American Car & Foundry Co. v. Anderson, 211 F. 301, 127 C.C.A. 587.

D.C.Mo. 1926. Proceeding by legatee of nonresident decedent to prevent ancillary administrator from interfering with property rights in specific property is not collateral attack on appointment.

Fairchild v. Lohman, 13 F.2d 252.

Where the probate court has jurisdiction to appoint an administrator or executor the appointment cannot be collaterally attacked.

Mo. 1890. Brawford v. Wolfe, 15 S.W. 426, 103 Mo. 391.

Mo.App. 1903. In re Davison's Estate, 73 S.W. 373, 100 Mo.App. 263.

Mo.App. 1909. Connor v. Paul, 119 S.W. 1006, 138 Mo.App. 13.

Mo. 1857. Any illegality in a grant of letters of administration cannot be taken advantage of in a collateral proceeding.

Riley's Adm'r v. McCord's Adm'r, 24 Mo. 265.

Mo. 1877. V.A.M.S.Const. art. 5, § 12, provides that inferior tribunals shall be established in each county for the transaction of all county business, for appointing guardians, granting letters testamentary, etc.; and by Sess.Acts 1855, p. 499, the probate court was given exclusive original jurisdiction in all cases relative to the probate of wills and the granting of letters of administration. By the fifth section it was made a court of record; and section 3, art. 1, of the administration law provides that letters testamentary and of administration shall be granted in the county in which the mansion or place of abode of deceased was situated, but that, if he had no mansion and was possessed of lands, letters should be granted in the county in which the land or the greater part thereof may lie. *Held* that, where the probate court of a county appointed an administrator, the appointment could not be attacked in a collateral proceeding on the ground that deceased resided and had a mansion in another county.

Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

The power of a public administrator to act in a given estate cannot be questioned in a collateral proceeding, but must be determined in the probate court.

Mo. 1891. Dunn v. German-American Bank, 18 S.W. 1139, 109 Mo. 90.

Mo. 1894. Green v. Tittman, 27 S.W. 391, 124 Mo. 372.

Mo. 1919. Troll v. Third Nat. Bank of St. Louis, 211 S.W. 545, 278 Mo. 74.

Mo. 1893. Letters issued to an administrator are evidence that the proper steps were taken to procure the appointment, and parties desiring to make objection that it did not affirmatively appear that he made the affidavit required by Rev.St.1845, p. 64, § 13, must do so in the probate court, and it is not open to them to make such objections in a collateral suit.

Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1901. In an action by the public administrator to recover personalty paid to one of the heirs under a written agreement of all the heirs, who were of age, assigning their interests to such heir, the defense that there were no debts, and that the personalty had been rightfully assigned to defendant, was not a collateral attack on the order of the probate court directing the plaintiff to take charge of the estate.

Richardson v. Cole, 61 S.W. 182, 160 Mo. 372, 83 Am.St.Rep. 479.

The rule that the authority of a public administrator to take charge of the estate of a decedent cannot be questioned in a collateral proceeding is not applicable to a proceeding by an administrator to recover stock in a foreign corporation owned by the decedent and the certificates for which were held by defendant, who did not deny authority of plaintiff to sue for property of the es-

tate in Missouri, but denied that the stock in the corporation ever was in Missouri.

Mo. 1906. Richardson v. Busch, 95 S.W. 894, 198 Mo. 174, 115 Am.St.Rep. 472.

Mo. 1906. De La Vergne v. Richardson, 95 S.W. 898, 198 Mo. 189.

Mo. 1927. Probate court's determination that decedent lived in another state, made in assuming jurisdiction over administration of estate, is conclusive against collateral attack.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1901. Where the public administrator on his own motion takes charge of the estate of a deceased person in any one of the cases mentioned in Rev.St.1899, § 202, V.A.M.S. § 461.820, and files a notice of the fact in the office of the clerk of the probate court, as required by section 295, § 461.850, his relation to such estate thereafter is the same as if he had taken charge of it by order of the probate court or under letters of administration, under section 4; and, in an action by him for the recovery of assets belonging to the estate, the notice filed in the office of the clerk of the probate court is sufficient to establish his authority and capacity to sue, which can only be rebutted by showing an order of the probate court disapproving and arresting his action in taking charge of the estate, and any illegality therein is not subject to collateral attack.

Vermillion v. Le Clare, 89 Mo.App. 55.

Mo.App. 1907. In an action by an administrator for conversion of the property of his intestate, defendant cannot attack the validity of the granting of the letters of administration.

Griesel v. Jones, 99 S.W. 769, 123 Mo. App. 45.

Mo.App. 1915. Appointment of administrator *held* not collaterally attacked by denying him the right to recover property which the heirs had received and distributed among themselves.

Bell v. Farmers' & Traders' Bank, 174 S.W. 196, 188 Mo.App. 383.

Mo.App. 1916. The appointment of an administrator is a judgment of a court of record which cannot be attacked collaterally by proof that at his death deceased was a resident of another county.

Wyatt v. Wilhite, 183 S.W. 1107, 192 Mo.App. 551.

Mo.App. 1917. One refusing in circuit court to turn over property to an administrator on the ground that an administrator is unnecessary is attempting to collaterally attack a judgment of the probate court directing the administrator to take charge of the estate, which cannot be effectually done.

Meyer v. Nischwitz, 199 S.W. 744, 198 Mo.App. 101.

Mo.App. 1922. Where the record of the proceedings for the appointment of an administrator showed that appointee was not a distributee of decedent, and that one of the distributees was a resident of the state, who had not renounced his right to administer, and who was not served with citation to apply for administration, the judgment appointing the administrator was void on the face of the record, and subject to attack by a motion at the subsequent term for removal of the administrator, even if that attack was a collateral one.

Linder v. Burns, 243 S.W. 361.

Mo.App. 1930. Appointment of administratrix by probate court of wrong county was valid until vacated.

Thompson v. Kansas City, C. C. & St. J. Ry. Co., 27 S.W.2d 58, 224 Mo.App. 415.

Mo.App. 1936. Probate court's finding that decedent's widow was only twenty-four years of age and without particular business experience *held* not to invalidate judgment appointing widow as administratrix, where there was no finding that widow was not competent or suitable person. Mo.St.Ann. §§ 6, 7, pp. 8, 9, V.A.M.S. §§ 461.030, 461.110.

State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

Mo.App. 1944. Probate proceedings, wherein certain real estate was sold and claims against deceased paid, were not subject to collateral attack in subsequent proceeding to set aside orders and judgment entered therein.

Jones v. Bradley, 176 S.W.2d 72.

Mo.App. 1946. The appointment of administrator was a judicial act, and appointment was not subject to attack in a collateral proceeding, and if administrator acted within statutory power, the appointment could not be attacked in a collateral proceeding. Mo.R.S.A. §§ 7–10, V.A.M.S. §§ 461.030–461.050, 461.100.

Kerr v. Prudential Ins. Co. of America, 194 S.W.2d 706, 238 Mo.App. 972.

Mo.App. 1947. In action by executor against notary and surety on notary's bond because of false certificates of acknowledgment by notary on deeds executed by deceased, notary and surety could not show that appointment of executor was void, though they were not parties in proceedings in probate court wherein executor was ap-

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pointed, since proceedings in probate court were in rem and judgment appointing executor was conclusive as against the world. Mo.R.S.A. §§ 569, 13364, V.A.M.S. §§ 468.460, 486.050.

State ex rel. Nelson v. Hammett, 203 S. W.2d 115, 240 Mo.App. 307.

⇐29 (3). Want of jurisdiction.

For cases from other jurisdictions, see other Key Number Digests.

⇐29 (4). Errors and irregularities.

Mo.App. 1909. Failure of an executor to give bond, or to subscribe to an oath of office, is not such an irregularity as to justify collateral attack on his capacity.

Connor v. Paul, 119 S.W. 1006, 138 Mo. App. 13.

⇐29(5). Matters concluded.

A decree of the probate court appointing an administrator is conclusive, unless appealed from.

Mo. 1859. Naylor's Adm'r v. Moffatt, 29 Mo. 126.

Mo. 1877. Johnson v. Beazley, 65 Mo. 250, 27 Am.Rep. 276.

Mo. 1921. In an administrator's action against a railroad for death of its employee, judgment of the probate court appointing the administrator cannot be collaterally attacked by defendant railroad on any theory that, assuming decedent's widow, under Rev.St. 1909, § 15, V.A.M.S. § 461.030, had the first right to administer on the estate, the court, under sections 16 and 17, V.A.M.S. §§ 461.040, 461.050, could not, within 30 days appoint another person to administer without showing the widow had renounced her right.

McIntyre v. St. Louis & San Francisco Ry. Co., 227 S.W. 1047, 286 Mo. 234, certiorari denied St. Louis-San Francisco R. Co. v. McIntyre, 41 S.Ct. 376, 255 U.S. 573, 65 L.Ed. 792.

Mo.App. 1916. The appointment of an administrator is a judgment of a court of record which is res judicata as to his residence.

Wyatt v. Wilhite, 183 S.W. 1107, 192 Mo. App. 551.

Mo.App. 1920. In an action on life insurance certificate where insured had disappeared, it was not error to admit in evidence letters of administration on insured's estate as prima facie evidence of insured's death.

Bergman v. Supreme Tent, Knights of Maccabees of the World, 220 S.W. 1029, 203 Mo.App. 685.

Mo.App. 1922. The decision of the probate court that decedent was domiciled within the county at the time of his death, made in proceedings for the appointment of an administrator with the will annexed, is binding, though the appointment of the administrator was void because he was not, under the facts shown by the record, entitled to appointment.

Linder v. Burns, 243 S.W. 361.

⇐29 (6). Presumptions.

Mo. 1873. The appointment of an administrator c. t. a. assumes that the court has admitted the will to probate; but this assumption may be contested by the proper parties in due time.

Lackland v. Stevenson, 54 Mo. 108.

Mo. 1877. V.A.M.S.Const. art. 5, § 12, provides that inferior tribunals shall be established in each county for the transaction of all county business, for appointing guardians, granting letters testamentary, etc.; and by Sess.Acts 1855, p. 499, the probate court was given exclusive original jurisdiction in all cases relative to the probate of wills and the granting of letters of administration. By the fifth section it was made a court of record; and section 3, art. 1, of the administration law provides that letters testamentary and of administration shall be granted in the county in which the mansion or place of abode of deceased was situated, but that, if he had no mansion and was possessed of lands, letters should be granted in the county in which the land or the greater part thereof may lie. *Held* that, where the probate court appoints an administrator, it is to be presumed in a collateral proceeding that the court passed on the question of its jurisdiction, and passed on it correctly.

Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

An order directing one who had been appointed administrator de bonis non to turn over the property of the estate to the public administrator is prima facie evidence that there is a vacancy in the office; and on a collateral attack on deeds thereafter executed by the public administrator the presumption that there was a vacancy when the public administrator took charge of the estate is not overcome by the fact that there is no resignation of the former administrator in the record, where it appears that many of the papers filed in the matter of such estate were lost.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1927. Supreme Court must assume that probate court found that deceased was nonresident, where jurisdiction of application for appointment of administrator was

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based on that ground. Rev.St.1919, §§ 7, 8, 14, V.A.M.S. §§ 461.030, 461.040, 461.230.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo. 1933. That order of appointment described administrator as public administrator, and he took charge of estate without giving bond, warranted conclusion that he acted in official rather than individual status.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

⇐30. Failure to qualify or act.

For cases from other jurisdictions, see other Key Number Digests.

⇐31. Termination of authority in general.

Mo. 1894. Where the record of a probate court shows that after an administrator gave notice of his intention to make final settlement four years elapsed before he actually made his final settlement, but the record contains no order discharging the administrator, he still remained during that time within the control and jurisdiction of the court.

Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1912. Under Rev.St.1909, § 21, V.A.M.S. §§ 461.080, 461.090, which provides for the appointment of an administrator effective during the pendency of a will contest, his right to act ends on the will being sustained.

State ex rel. Ashton v. Imel, 147 S.W. 989, 243 Mo. 180.

Mo. 1922. Administrators pendente lite hold office only until the reason for their appointment ceases, when they are superseded either by the executors under the will, if the will is sustained, or by the regular administrator, if the will is denied probate. Per Graves, Walker and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo. 1924. An estate is not fully administered, until nothing remains to be done to vest title in the beneficiary, whether creditor, next of kin, legatee or devisee.

Wyatt v. Stillman Institute, 260 S.W. 73, 303 Mo. 94.

Mo. 1931. Will contest does not authorize probate court to terminate authority of executor whose appointment has been confirmed, but only to appoint disinterested person administrator pendente lite. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Authority of administrator pendente lite ceases, and administrator must deliver estate back to regular executor when will contest establishes will. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Upon termination of contest establishing will, executor originally appointed is entitled, without further authorization, to take possession and resume administration of estate. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Upon termination of contest establishing will, probate court should make any necessary orders to aid executor in obtaining possession of estate and continuing administration. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

After contest establishing will, where probate court was asked to make orders assisting executor in obtaining possession of estate and continuing administration, probate court could not adjudge executor incompetent and appoint administrator de bonis non. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Mo. 1943. The tenure of an administrator pendente lite extends until final determination of the will contest, and his powers and duties are the same as those of a regular administrator, including the duty to collect and preserve the estate. Mo.R.S.A. § 14, V.A.M.S. § 461.090.

Odom v. Langston, 173 S.W.2d 826, 351 Mo. 609, transferred 170 S.W.2d 589, 237 Mo.App. 721, transferred 159 S.W. 2d 686.

Mo. 1951. Where probate court ordered administrator to take charge of real estate of decedent, and subsequently ordered administrator to sell real estate to pay debts of estate, and administrator made sale, which was reported, approved and confirmed, probate administration for payment of allowed demands was not suspended by will contest. V.A.M.S. §§ 461.080, 461.090.

Schupbach v. Fisler, 239 S.W.2d 502, 362 Mo. 35.

Mo.App. 1896. A temporary administrator, appointed under Rev.St.1889, § 13, V.A.M.S. §§ 461.080, 461.090, pending the absence of the person entitled to administration, may be removed on the latter's return,

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though the appointment did not recite that the appointment was because of such absence.

In re Estes' Estate, 65 Mo.App. 38.

Mo.App. 1902. A public administrator has a right to continue in charge of an estate after his term of office expires, and his successor is elected and has qualified, under the express terms of Rev.St.1889, § 301, V.A.M.S. § 461.890, providing that a public administrator appointed to take charge of an estate shall continue the administration until finally settled, unless he dies, or is removed or discharged in the ordinary course of law.

State ex rel. Rutledge v. Holman, 67 S.W. 747, 93 Mo.App. 611.

Mo.App. 1904. Rev.St.1889, § 257, authorizing probate courts to appoint an agent to take charge of land belonging to a decedent's estate, having been repealed by Laws 1899, p. 41, an agent previously appointed thereunder had no capacity to sue after such repeal to recover rent for lands of his decedent leased by him.

Wendleton v. Kingery, 84 S.W. 102, 110 Mo.App. 67.

Mo.App. 1910. An administrator's power ceases after final settlement, pursuant to due notice and approval thereof, accompanied by an order of discharge, so that he cannot thereafter sue as administrator on a demand due the estate, though if the final settlement was approved without an order of discharge, he is still under the control of the probate court, and may sue for the estate.

Ewing v. Parrish, 128 S.W. 538, 148 Mo. App. 492.

An administrator may, after approval of his final settlement, subsequent to the term at which it was rendered, but before his final discharge, sue to collect the assets not known to him when settlement was made.

Ewing v. Parrish, 128 S.W. 538, 148 Mo. App. 492.

Though the judgment of the probate court, on the final settlement of an administrator, provided that the filing of the receipts from the distributees should be in full discharge of all funds held by him, where no receipts were filed because the distributees contested the settlement, the administrator continued to be such so as to authorize him to sue to recover assets of which he had no knowledge at the settlement.

Ewing v. Parrish, 128 S.W. 538, 148 Mo. App. 492.

Mo.App. 1916. Authority of administrator pendente lite appointed by probate court continued until final result of will contest was duly certified to probate court, and did not die upon termination of the will contest, and transcript of record of will contest in circuit court availed defendants nothing in administrator's actions of unlawful entry and detainer.

Diehr v. Dean, 187 S.W. 602.

Mo.App. 1931. Office of executor or administrator continues until decree in probate court is entered discharging him.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Mo.App. 1936. Until executor is discharged, his office continues, and he remains clothed with duties thereof.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

⇐32. Revocation of letters.

⇐32 (1). Grounds for or objections to revocation.

Mo. 1875. Under Administration Act, art. 1, §§ 8, 45, the removal from the state of the administratrix will not of itself revoke her letters; but an order or judgment of some sort from the court having charge of the estate is necessary for that purpose.

State ex rel. Rucker v. Rucker, 59 Mo. 17.

Mo. 1880. On the issue of the validity of an order of the probate court removing an administrator, it appeared that letters were granted to the administrator in 1857; that he made settlements in 1859, 1861, 1867, and 1870; that in 1873 citation was issued requiring him to appear and make settlement at the January term, 1874, of the court; that he appeared at the term and his settlement was continued; that at a subsequent term he appeared and filed proof of publication of notice of his intention to make final settlement, and the settlement was continued to another term, and again continued; that he failed to appear and make settlement at the term to which the matter was continued. *Held*, that the probate court had authority, under Wag. St. p. 77, § 50, and page 108, § 8, to make an order revoking the letters of administration.

Scott v. Crews, 72 Mo. 261.

Mo. 1882. Though a probate court has no authority on a mere motion to remove an administrator, or revoke his letters, on the ground that the estate has been fully administered, or that there are no assets, or that the present administration is for prosecuting vexatious suits, yet it is the inherent power of every court to correct an error which it may have committed, when no positive rule of law forbids it, and hence a probate court may revoke an order appointing a public administrator, when it appears that the public administrator had no authority under

the law to take charge of the estate of the decedent.

McCabe v. Lewis, 76 Mo. 296.

Mo. 1900. Rev.St.1889, § 13, V.A.M.S. §§ 461.080, 461.000, provides that if the validity of a will be contested, or the executor be a minor, or absent from the state, letters of administration shall be granted during the time of such contest, minority, or absence to some other person. *Held*, that an order of the probate court revoking letters of administration issued under such section, made after the determination of a will contest in the circuit court, but during the pendency of an appeal therefrom, was erroneous, the appeal to the supreme court being a part of the "time of such contest."

State ex rel. Hamilton v. Guinotte, 57 S. W. 281, 156 Mo. 513, 50 L.R.A. 787.

Mo. 1916. Rev.St.1909, § 47, V.A.M.S. § 461.210, requiring that on discovery and probate of a will the letters of administration of the administrator theretofore appointed shall be revoked, applies as well to the public administrator as to others, although he has on due notice taken charge of an estate.

Brinckwirth's Estate v. Troll, 181 S.W. 403, 266 Mo. 473.

It being the duty of the public administrator to be at all times in court and take notice of all proceedings, failure to give actual notice of a proceeding to revoke his letters on discovery of a will does not vitiate the order of revocation.

Brinckwirth's Estate v. Troll, 181 S.W. 403, 266 Mo. 473.

On discovery and probate of a will, the powers of the public administrator to administer the estate cease ipso facto, and he is therefore entitled to no notice of a proceeding formally to vacate his authority.

Brinckwirth's Estate v. Troll, 181 S.W. 403, 266 Mo. 473.

Where the public administrator has no superior right to appointment as administrator with will annexed no appeal will be allowed from the discretionary order revoking his letters.

Brinckwirth's Estate v. Troll, 181 S.W. 403, 266 Mo. 473.

Mo. 1931. Pending will contest, probate court cannot revoke letters testamentary already granted to executor named in will. Rev.St.1929, §§ 11, 14, V.A.M.S. §§ 461.060, 461.090.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Mo. 1944. In a proper case letters of administration may by due process be revoked by the exercise of an inherent power of the probate court in the performance of its duties in supervising the administration of the estates of decedents. Mo.R.S.A. §§ 18, 2437; V.A.M.S.Const. art. 6, § 34, V.A.M.S. §§ 461.150, 461.260.

Ross v. Pitcairn, 179 S.W.2d 35, 153 A. L.R. 215.

Mo.App. 1888. A probate court has authority to revoke letters granted to one other than the widow without the filing of a renunciation by her, under Rev.St.1879, §§ 7–9, even at a subsequent term.

Skelly v. Veerkamp, 30 Mo.App. 49.

Mo.App. 1906. Rev.St.1889, § 294, V.A.M.S. § 461.890, provides that when a public administrator has been appointed to take charge of the estate he shall continue the administration until final settlement unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of law. Section 298, § 461.880, gives the probate court authority at any time for good cause shown to order the public administrator to account for and deliver all property, etc., belonging to any estate in his hands to the heirs of said estate. *Held*, that it was proper on a showing of the facts for the probate court to revoke the public administrator's letters and grant letters to the heir.

Hollingsworth v. Jeffries, 97 S.W. 632, 121 Mo.App. 660.

Mo.App. 1942. A stipulation that if executor were present he would testify that he would not pay $2,000 into estate in accordance with provision in will devising executor certain property if he paid $2,000 into estate, was not a "rejection", and, hence, executor had a beneficial interest adverse to contestant of will, so as to authorize his removal upon ground that a will contest was pending and that executor was interested in the estate. Rev.St.1939, § 14, V.A.M.S. § 461.090.

Sudekum v. Fasnacht's Estate, 157 S.W. 2d 264, 236 Mo.App. 455.

An agreement by executor's counsel during course of trial renouncing executor's testamentary gift would not constitute a present "renunciation", so as to require overruling of motion by one contesting will to remove executor upon ground that a will contest was pending and that executor was interested in the estate by reason of a bequest to him, where there was nothing in record to show that attorney had express authority to act for executor in the matter. Rev.St.1939, § 14, V.A.M.S. § 461.090.

Sudekum v. Fasnacht's Estate, 157 S.W. 2d 264, 236 Mo.App. 455.

Mo.App. 1946. Unless facts are such as are enumerated in statute describing conditions under which a public administrator

may be eligible to act in his official capacity, appointment is invalid so as to justify administrator's removal. Mo.R.S.A. § 299, V.A.M.S. § 461.820.

Donelson's Estate v. Gorman, 192 S.W.2d 29, 239 Mo.App. 300.

⇐32(2). Application and proceedings thereon.

Mo. 1840. An appeal lies from an order revoking letters of administration before granted by the court.

Mullanphy v. St. Louis County Court, 6 Mo. 563.

An appeal from the decision of a county court revoking letters of administration does not operate as a supersedeas, the provisions concerning supersedeas extending only to those cases in which the appellant is adjudged to pay a debt.

Mullanphy v. St. Louis County Court, 6 Mo. 563.

Mo. 1859. An appeal from a decree of a probate court revoking letters of administration will not suspend the operation of the decree.

Harney v. Scott, 28 Mo. 333.

Mo. 1875. In the absence of any appeal from the final settlement of an administrator, made during the nonresidence of his co-administratrix, an order of distribution approving the same, and completely ignoring her, will have the force and effect of an order revoking her letters.

State ex rel. Rucker v. Rucker, 59 Mo. 17.

Mo. 1880. Wag.St. p. 77, § 50, provides that, if any executor or administrator fails to make either annual or final statements after citation, the court shall order him to give notice, when required, and to make such settlement, and may enforce the order by attachment or may revoke his letters. An order for the removal of an administrator recited that "he failed and still fails and refuses to make final settlement, or to show cause, after having been properly cited to do so, why it cannot be made." *Held* that, as all the facts necessary to confer jurisdiction affirmatively appeared on the face of the proceeding, the judgment of removal must be deemed conclusive until set aside.

Scott v. Crews, 72 Mo. 261.

Wag.St. p. 77, § 50, relating to the removal of executors and administrators, authorizes the court, in case of a delinquent executor or administrator, to order him to make settlement or to revoke his letters.

Scott v. Crews, 72 Mo. 261.

Mo. 1900. Rev.St.1889, §§ 8888, 8889, V.A.M.S. §§ 468.580, 468.590, authorize a will contest in the circuit court, and the trial of an issue as to whether the writing produced be the will of the testator or not, and provide that the jury's verdict or court's finding shall be final, saving the right to grant a new trial and an appeal on matters of law. *Held*, that on appeal from the circuit court the supreme court will review the sufficiency of the evidence, and that hence an order of the probate court, made during the pendency of an appeal involving such issue, which revoked letters of administration issued pendente lite, was erroneous.

State ex rel. Hamilton v. Guinotte, 57 S.W. 281, 156 Mo. 513, 50 L.R.A. 787.

Mo. 1902. Rev.St.1899, § 278, V.A.M.S. § 467.010, confers the right of appeal, among other cases, from an order revoking letters of administration. Section 281, § 467.050, requires the appellant to give an approved bond to prosecute the appeal, and pay all debts, damages, and costs that may be adjudged against him. Section 283, 467.070, provides that on the filing of an affidavit and bond, and the latter's approval, an appeal shall be granted, but shall not operate as a supersedeas on any other matter relating to the administration of the estate, except that from which the appeal is specially taken. Section 284, § 467.080, provides for the transmission thereupon of a certified transcript of the record and proceeding with the original papers relating to the cause. Section 285, § 467.090, provides that on the filing of such transcript and papers the circuit court shall be possessed of the cause, and shall proceed to hear the same anew, etc. *Held*, that an appeal taken in compliance therewith from a revocation of letters of administration operated as a supersedeas, so as to entitle appellant to retain the assets of the estate during its pendency, and the probate court was thereby devested of any further authority in regard thereto during such time.

Cuendet v. Henderson, 66 S.W. 1079, 166 Mo. 657.

Mo. 1922. An order of the probate court, entered when a suit to contest a will was filed in the circuit court suspending the executor appointed under the will and appointing a temporary administrator, is appealable to the circuit court under Rev.St.1919, § 282, cl. 9, V.A.M.S. § 467.010, allowing appeals from all orders revoking letters testamentary or of administration, since the effect of the order was to revoke the letters testamentary, temporarily, at least. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo. 1925. Court, having appointed administrator prematurely, could revoke ap-

pointment on own motion without complaint in writing required for "revocation for cause."

In re Allen's Estate, 271 S.W. 755, 307 Mo. 674.

Mo. 1936. Order setting aside appointment of executrix of will because will was set aside and not because of misconduct or neglect of duty *held* not appealable. Mo.St. Ann. § 284, p. 177, V.A.M.S. § 467.010.

Lucitt v. Toohey's Estate, 89 S.W.2d 662, 338 Mo. 343.

Mo. 1944. The lapse of the term at which letters of administration were granted would not preclude institution of separate and distinct proceeding in the administration of the estate pending at a subsequent term to revoke, for lawful reason, letters granted at the former term. Mo.R.S.A. § 2437; V.A.M.S. Const. art. 6, § 34, V.A.M.S. § 481.020.

Ross v. Pitcairn, 179 S.W.2d 35, 153 A. L.R. 215.

Mo.App. 1879. A debtor of a decedent, when sued by the administrator, may file an application in the probate court to set aside the letters of administration, on the ground that the supposed decedent is still alive, since he could not collaterally attack the appointment of the administrator in the action against him.

Donaldson v. Lewis, 7 Mo.App. 403.

Wag.St. p. 119, § 87, provides that appeals may be taken from the probate court to the circuit court in certain enumerated cases, "and in all other cases where there shall be a final decision of any matter arising under the provision of this law." One of the enumerated cases for an appeal is "all orders revoking letters testamentary or of administration." *Held*, that the statute by implication applies to orders refusing to revoke letters testamentary or of administration, as well as orders revoking such letters,

Donaldson v. Lewis, 7 Mo.App. 403.

Mo.App. 1880. Revocation of letters as affecting subsequent allowance of claim on appeal. See, Schwecke v. Mathias, 8 Mo.App. 560, memorandum.

Mo.App. 1892. Rev.St. § 285, V.A.M.S. § 467.010, giving the right of appeal from the probate court to the circuit court, gives an appeal "on all orders revoking letters testamentary or of administration," but it does not in express terms grant an appeal from a judgment refusing to revoke letters testamentary; but in the fifteenth clause it gives the right of appeal "in all other cases where there shall be a final decision of any matter arising under the provisions of this chapter." *Held*, that the statute gives the right of appeal from the order refusing to revoke letters of administration.

Owens v. Link, 48 Mo.App. 534.

Mo.App. 1901. A complaint in a proceeding to revoke letters of administration and remove the administrator, sworn to by one of the complainants, is sufficient.

Lewellyn v. Lewellyn, 87 Mo.App. 9.

Mo.App. 1912. Under Rev.St.1909, § 9, and section 280, subds. 9, 15, V.A.M.S. §§ 461.130, 467.010, an administrator appointed in vacation *held* not entitled to appeal from an order of the probate court afterwards made in term rejecting the vacation appointment.

Marshall v. Shoemaker's Estate, 144 S.W. 1120, 164 Mo.App. 429.

Mo.App. 1921. Where the probate court in one order appointed an administrator pendente lite and suspended the letters testamentary previously issued to the executor during the pendency of the will contest, the executor could appeal from the portion of the order suspending its letters without involving the portion appointing the administrator pendente lite.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

Mo.App. 1922. A motion to remove an administrator, based on the grounds, among others, that the movant was a son of deceased and had a waiver from all the legal heirs to administer upon the estate, and because the administrator appointed had no lawful right to administer upon the estate, was sufficient to raise the question of want of jurisdiction to appoint the administrator because there was a distributee residing in the state who had not renounced or been cited, so that such want of jurisdiction can be considered on appeal, notwithstanding Rev.St.1919, § 1267, V.A.M.S. § 509.280.

Linder v. Burns, 243 S.W. 361.

Mo.App. 1929. Probate court acted within judicial authority in correcting record at same term, to revoke appointment of administrator in place of executors illegally attempting to resign. Rev.St.1919, § 43, V.A.M.S. § 461.510.

State ex rel. Ramsey v. Green, 17 S.W.2d 620.

Mo.App. 1932. Order refusing letters of administration *held*, as to surety, revocation of prior order at same term appointing administratrix.

Holland v. Reburn, 52 S.W.2d 219.

Mo.App. 1936. Reviewing court on appeal from order revoking letters of adminis-

tration because of admission of will of decedent to probate in other county could not consider sufficiency of proof supporting probate of will in the other county. Mo.St.Ann. §§ 40, 530, pp. 27, 323, V.A.M.S. §§ 461.220, 468.170.

In re Greening's Estate, 89 S.W.2d 123, 232 Mo.App. 78.

Mo.App. 1940. An appeal will lie to the circuit court from an order of the probate court refusing to revoke letters of administration theretofore granted. Mo.St.Ann. § 284, p. 177, V.A.M.S. § 467.010.

In re Helm's Estate, 136 S.W.2d 427.

Mo.App. 1940. Administrator with will annexed who had been appointed by probate court and had qualified had right to take appeal to circuit court from order of probate court revoking his appointment and was entitled to hearing in circuit court. Mo.St.Ann. § 9, p. 12; § 284, p. 177; § 292, p. 184, V.A.M.S. §§ 461.050, 467.010.

In re Crooks' Estate, 138 S.W.2d 6.

An order of probate court revoking letters of administration is "appealable" to the circuit court. Mo.St.Ann. § 284, p. 177, V.A.M.S. § 467.010.

In re Crooks' Estate, 138 S.W.2d 6.

Mo.App. 1943. In proceedings to remove administratrix, where appeal from judgment of probate court refusing to revoke letters of administration was not expressly prohibited by law, there was right of appeal therefrom under statutes relating to appeals from probate court and jurisdiction to hear and determine cause was vested in circuit court. Mo.R.S.A. §§ 283, 2100, V.A.M.S. §§ 50.100, 481.100 note.

In re Scott's Estate, 173 S.W.2d 115, 237 Mo.App. 1260.

Where additional abstract in proceedings to remove administratrix was filed which contained evidence not a part of record nor in bill of exceptions approved by trial court, abstract could not be considered on appeal to support motion to dismiss appeal on ground that all the evidence upon which the judgment of the trial court was based was not embodied in bill of exceptions.

In re Scott's Estate, 173 S.W.2d 115, 237 Mo.App. 1260.

In proceedings to remove administratrix on ground that she was not lawful wife of testator, appellants could not complain of trial judge's finding that administratrix was lawful wife where divorce transcript offered as evidence in instant case was also offered in evidence in related case, there was consent to the judge's proposal to enter same finding in instant case as in related case with respect to validity of divorce, and evidence in related case was not introduced in instant case or made part of the record thereof.

In re Scott's Estate, 173 S.W.2d 115, 237 Mo.App. 1260.

In proceedings to remove administratrix on ground that she was not the lawful wife of the testator, admission of testimony of administratrix as to payments of husband to children and former wife and as to administratrix's marriage relationship with husband was harmless error, where testimony was cumulative, and case was tried to the court.

In re Scott's Estate, 173 S.W.2d 115, 237 Mo.App. 1260.

⇐33. Resignation and discharge.

Mo. 1884. One of two executors removed from the state, and thereafter the court treated the other as the sole testamentary representative of the testator. *Held*, that the court in effect discharged the executor who removed from the state, though no formal entry of discharge was made.

Vosler v. Brock, 84 Mo. 574.

Where the records of a probate court show a full settlement of an administrator, made "upon his resignation," the presumption is that he gave the eight-weeks notice of his intention to resign required by Rev.St. 1845, p. 60, § 40, and that the court had power to order the estate into the hands of the public administrator.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1893. Where it does not appear that any express order was made permitting an administrator to resign, but it does appear that he appeared before the court, and his accounts as administrator were stated on the record, and he then made a full settlement, and the record refers to it as a settlement made on his resignation, such settlement constituted a good and sufficient acceptance of the resignation; for, informal as the entry was, it showed a settlement of accounts, in view of the resignation then tendered.

Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Where an executor gives notice of his intention to make a final settlement, and is directed by the court, on filing his account, to pay over to his successor a balance due the estate, and on qualification of the successor complies with such order, a good resignation of the executorship, as between the executor and the successor, is effected, even though no notice was given by

the executor of an intention to apply for leave to resign.

Emmons v. Gordon, 24 S.W. 146, affirmed in banc 25 S.W. 938.

Mo. 1901. Rev.St.1889, § 301, V.A.M.S. § 461.890, declares that, when the public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or discharged in the course of law. *Held*, that the word "resigns" has reference to his office as public administrator, and not his appointment by the probate court to take charge of any particular estate; and hence, on his resignation, accepted by the governor, and his successor having been appointed, he becomes incapacitated to administer estates in his hands.

State ex rel. Gordon v. Kennedy, 63 S. W. 678, 163 Mo. 510.

Mo. 1916. Right of renouncement of person named in will as executor is available only in tribunal of testator's domicile, and after an executor has qualified in such tribunal his resignation in an ancillary jurisdiction is void.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas. 1918D, 454.

Mo. 1933. Public administrator should not be permitted to resign at his own option when law has made it incumbent on him to undertake administration of estate. Rev.St. 1929, §§ 44, 45, 300, V.A.M.S. §§ 461.510, 461.520, 461.840.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

For good cause shown, probate court could accept resignation of public administrator having given due notice of his intention to resign. Rev.St.1929, §§ 44, 45, 300, 301, V.A.M.S. §§ 461.510, 461.520, 461.840, 461.890.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

Order of probate court accepting resignation of public administrator *held* appealable. Rev.St.1929, §§ 284, 1938, V.A.M.S. §§ 407.010, 478.070.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

Mo. 1936. Probate court could not lawfully approve final settlement, close estate, and discharge administratrices while there were demands legally pending and undisposed of in either the probate court or other courts of record, and there were available assets for their satisfaction.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Mo.App. 1912. The right of an administrator to be discharged after final settlement and performance of his duties is necessarily implied, though not expressly authorized by statute.

In re Rooney's Estate, 143 S.W. 688, 163 Mo.App. 389.

Mo.App. 1929. Representative cannot terminate responsibility by resignation without published statutory notice. Rev.St.1919, §§ 43, 44, V.A.M.S. §§ 461.510, 461.520.

State ex rel. Ramsey v. Green, 17 S.W.2d 629.

Mo.App. 1930. Probate judgment distributing estate and discharging administrator *held* valid.

Gorg v. Rutherford, 31 S.W.2d 585.

⇐34. Disqualification.

Mo. 1852. Act 1825, § 3, concerning administrators and executors, declares that no "married woman shall act as executrix or administratrix"; and section 15 of the same act declares that, "where any feme covert executrix or administratrix shall marry, the marriage shall operate as an extinguishment of her powers, and her letters shall be revoked and repealed." *Held*, that these sections have no retrospective operation, and hence, until the probate court has taken steps to revoke and annul the letters of an administratrix who had married before the passage of the act, she will continue to be de jure and de facto executrix.

Frye v. Kimball, 16 Mo. 9.

Mo. 1855. The authority of an administrator being revoked on his becoming a nonresident, he cannot be a party to any suit.

Chouteau's Ex'r v. Burlando, 20 Mo. 482.

Mo. 1884. Where one executor removes from the state, and the court treats the other as the sole testamentary representative of the deceased, it is in effect a discharge of the one so removing though no formal entry to that effect appears.

Vosler v. Brock, 84 Mo. 574.

Mo.App. 1876. In a proceeding for the removal of an executor because of his removal from the state, and consequent disqualification under Rev.Code 1845, p. 72, art. 1, § 58, evidence *held* insufficient to show such removal from the state.

Walker's Estate v. Walker, 1 Mo.App. 404.

In a proceeding for the removal of an executor on account of nonresidence, which, under Rev.Code 1845, p. 72, art. 1, § 58, disqualifies him from acting in that capacity, the burden is on those seeking his removal

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to show that he has ceased to be a resident of this state.

Walker's Estate v. Walker, 1 Mo.App. 404.

⇐35. Removal.

⇐35 (1). Grounds in general.

Mo.App. 1900. An executor who became a party to a scheme to frustrate the intention of testator to provide by will for his widow should have been removed.

Haynes v. Carpenter, 86 Mo.App. 30.

Mo.App. 1920. In construing Rev.St. 1909, § 50, V.A.M.S. § 461.500, providing for removal of an executor or administrator who has become of unsound mind, or has been convicted of any felony or other infamous crime, or has absented himself from the state for a specified period or has become an habitual drunkard, or is "in any wise incapable or unsuitable to execute the trust reposed in him," the quoted phrase is complete within itself, and does not, under the principle of ejusdem generis, cover merely causes similar to those enumerated.

Davis v. Roberts, 226 S.W. 662, 206 Mo. App. 125.

Mo.App. 1938. The executor would not be ousted from execution of testamentary trust, notwithstanding it had improperly sought to nullify provision of will providing for an advancement where removal of the executor would thwart the wishes of the testator.

Hanssen v. Karbe, 115 S.W.2d 109, 234 Mo.App. 663, transferred 106 S.W.2d 415.

⇐35 (2). Hostility or adverse interest.

Mo.App. 1904. A mere hostile or unfriendly feeling of an administrator toward persons interested in the estate is not ground for his removal, unless it is of such a character as to prevent the management of the estate according to the dictates of prudence and the interests of the heirs, devisees, and creditors.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Since the institution of a suit to partition the lands of a decedent who died testate is in no sense a contest of the will, its institution affords no grounds for the removal of an administrator with the will annexed during its pendency.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1920. In a proceeding under Rev.St.1909, § 50, V.A.M.S. § 461.500, to remove an executor on the ground that he is unsuitable to execute the trust because of his claim to ownership of note payable to testator, it was not necessary to show that the estate was the owner of the note, but merely that there was a real and substantial controversy as to the ownership, and that there was reasonable and probable cause to believe that the note belonged to the estate.

Davis v. Roberts, 226 S.W. 662, 206 Mo. App. 125.

Where an executor claims ownership of a note payable to testator, and where there is a real and substantial controversy as to the ownership of the note as between the estate and the executor, the executor will be removed in proceedings by the beneficiary under the will under Rev.St.1909, § 50, V.A.M.S. § 461.500, providing for the removal of an executor who is "in any wise incapable or unsuitable to execute the trust"; his interests being conflicting with that of the estate.

Davis v. Roberts, 226 S.W. 662, 206 Mo. App. 125.

⇐35 (3). Fraud.

For cases from other jurisdictions, see other Key Number Digests.

⇐35 (4). Misconduct respecting sale of property of estate.

Mo.App. 1904. The insistence of an administrator that sales of decedent's real estate to the administrator's brothers should be approved, in the face of a better offer by decedent's widow, is no proof of such bad faith on the part of the administrator as would justify his removal, where it appeared that the administrator knew decedent's widow was without means to make good her offer, and that she had not, at the time the report was under consideration, given or tendered the bond which she had notified him she would give.

In re Rinkel's Estate, 80 S.W. 716, 107 Mo.App. 74.

The refusal or failure of an administrator to consider the bid of a person for the purchase of decedent's real estate after a sale thereof had been consummated to another is no evidence of waste or bad faith, so as to warrant removal.

In re Rinkel's Estate, 80 S.W. 716, 107 Mo.App. 74.

⇐35(5)-35(7).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐35 (8). Waste, negligence, or mismanagement.

Mo.App. 1892. Rev.St.1889, § 42, V.A.M.S. § 461.500, provides that if any executor

or administrator shall become unsuitable to execute the trust, or fail to discharge his duties, or shall waste or mismanage the estate, the court, on complaint, by any person interested, supported by affidavit, shall hear the complaint and may revoke the letters granted. *Held*, that if, on a survey of the whole administration, it appears that the administrator is wasting the estate, or abusing his trust, as by fraudulently procuring the allowance of an improper claim in his own favor, a just ground for removal is shown.

Owens v. Link, 48 Mo.App. 534.

⇐35(8½). Grounds for refusing to remove.

Mo.App. 1920. That the beneficiary under a will could have ownership of note, payable to testator but claimed by executor, ascertained in proceedings under Rev.St.1909, §§ 70–73, V.A.M.S. §§ 462.400–462.430, does not preclude him from procuring the exector's removal as one who is unsuitable to execute the trust reposed in him, because of interests conflicting with those of the estate, under section 50.

Davis v. Roberts, 226 S.W. 662, 206 Mo. App. 125.

⇐35(9). Coexecutors and coadministrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐35(10). Nature and form of proceeding.

Mo.App. 1920. A proceeding for the removal of an executor or administrator under Rev.St.1909, § 50, is a proceeding in rem, in which removal can be had only upon the grounds mentioned in the statute, and for causes arising after appointment.

Davis v. Roberts, 226 S.W. 662, 206 Mo. App. 125.

⇐35(10½)-35(13½).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐35(14). Pleading.

Mo.App. 1901. A complaint in a proceeding to remove an administrator, which alleges generally wherein the administrator has failed to administer the estate according to law and to inventory personal property of the estate and failed to wind up the estate within the time prescribed by statute, although general, is sufficient, after verdict, to support the judgment.

Lewellyn v. Lewellyn, 87 Mo.App. 9.

⇐35(15). Evidence.

Mo.App. 1888. Under the particular circumstances, *held*, that the court erred in excluding testimony, in proceedings to remove an executor, in regard to the administration of the estate prior to the trial of a former suit for the same purpose, in which judgment was rendered for the executor, as the matters transpiring before the former suit were so intimately blended with matters transpiring thereafter as to call for a new inquiry into the entire administration of the estate from the beginning as essential to the making of a proper decree.

Meriwether v. Block, 31 Mo.App. 170.

⇐35(16)-35(18).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐35(19). Review.

Mo.App. 1923. Order of probate, removing an executrix and appointing an administrator pendente lite, during pendency of suit in the circuit court to contest the will, is appealable to circuit court.

In re Bennett's Estate, 249 S.W. 685.

Mo.App. 1931. That purported reappointment of executor after will was sustained in contest proceedings was made in vacation did not prevent appeal by executor from subsequent order removing him.

In re Pierron's Estate, 39 S.W.2d 458.

Executor *held* entitled to appeal from order removing him and appointing administrator after will had been sustained. Rev.St. 1929, §§ 284, 292, V.A.M.S. §§ 467.010, 467.090.

In re Pierron's Estate, 39 S.W.2d 458.

Circuit court, on appeal by executor from order removing him and appointing administrator, is required to hear case anew. Rev. St.1929, § 292, V.A.M.S. § 467.090.

In re Pierron's Estate, 39 S.W.2d 458.

Mo.App. 1945. An appeal lies to circuit court from probate court's order overruling petition to remove executrix.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

Mo.App. 1945. The date of filing of application by administratrix for permission to sell her decedent's personalty, though not conclusive as to her rights to sell, went to her claim of good faith and was material as respects sufficiency of abstract on her appeal from judgment removing her as administratrix. Kansas City Court of Appeals Rules, rule 15.

Scurlock v. Hovey, 185 S.W.2d 69.

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Where appellant's abstract omitted material portions of evidence and exhibits necessary for appellate court to determine correctness of circuit court's judgment removing appellant as administratrix and disapproving of her semiannual settlement, and appellant made no reply to respondent's motion to dismiss for such omissions, appeals were dismissed. Kansas City Court of Appeals Rules, rules 15, 18.

Scurlock v. Hovey, 185 S.W.2d 69.

⇐35(20). Operation and effect.

C.C.A.Mo. 1919. A public administrator, after his removal from office, has no interest in an estate of which he has taken charge which will support an appeal by him in a pending suit.

Slater v. Thompson, 255 F. 768, 167 C.C.A. 112.

Mo. 1872. Lawful acts of administrators done in good faith shall not be impeached by any will appearing, nor by any subsequent rovocation or superseding of their authority.

Tapley v. McPike, 50 Mo. 589.

Mo.App. 1888. There is no relationship between different legatees and devisees of an estate, so as to create a privity of interest or estate in the legal sense of the term; but under Rev.St.1879, § 43, a proceeding to remove an executor is necessarily a proceeding in rem, and a judgment therein is binding to all the world as a final adjudication.

Meriwether v. Block, 31 Mo.App. 170.

Mo.App. 1924. It is the duty of a deposed administrator whose authority ceases on his removal and appointment of his successor, Rev.St.1919, §§ 30, 31, V.A.M.S. §§ 461.370, 461.420, to immediately turn over to the latter all property in his hands belonging to the estate.

Williams v. People's Bank of Springfield, 257 S.W. 192.

⇐35(21)-36.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐37. Administrators de bonis non.

⇐37(1). In general.

Mo. 1880. Under Wag.St. p. 81, § 67, providing that if an administrator resigns, or his letters are revoked, the court shall have the power on the application of his successor, to ascertain the amount of money in his hands at the time of his resignation or the revocation of his letters, and page 77, § 47, providing that, if the letters of any administrator shall be revoked, he shall account for and pay to his successor all money at such times and in such manner as the court shall direct, and section 48, declaring that the succeeding administrator may proceed at law against the delinquent and his sureties, and section 50, conferring power on the county court after notice to revoke the letters of a delinquent administrator, the probate court has power to appoint an administrator de bonis non in a case where there are no debts due from the estate, as the appointment may be made for the protection of the heirs and distributees.

Scott v. Crews, 72 Mo. 261.

Mo. 1933. Administrator de bonis non with will annexed may be appointed after final settlement by original administrator or executor, where will directs sale of land at subsequent death of life tenant to best advantage and distribution of proceeds as provided therein. Rev.St.1929, § 47, V.A.M.S. § 461.540.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversed 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W.2d 367.

⇐37(2). Grounds for appointment.

Mo. 1876. The county court has no authority to appoint an administrator de bonis non merely to correct a mistake in a deed of the original administrator.

Grayson v. Weddle, 63 Mo. 523.

Mo. 1878. An administrator de bonis non cannot be appointed for the sole purpose of making a deed which his predecessor had neglected to make.

Long v. Joplin Mining & Smelting Co., 68 Mo. 422.

Mo.App. 1903. Laws 1903, p. 52, providing that if, after final settlement of an estate, assets be discovered, letters of administration of such assets shall be granted to those to whom administration would have been granted if the original letters had not been obtained, did not warrant the appointment of an administrator de bonis non to sell the estate in remainder in the homestead, there having been no assets "discovered."

Derge v. Hill, 77 S.W. 105, 103 Mo.App. 281.

Where for 14 years the creditors of a decedent's estate, knowing that there was a deficiency of assets, permitted the administrators to neglect to sell the estate in remainder in the homestead, and made no protest on final settlement of the estate, they could not obtain the appointment of an administrator de bonis non for the purpose of selling such estate.

Derge v. Hill, 77 S.W. 105, 103 Mo.App. 281.

Mo.App. 1904. Rev.St.1899, § 46, V.A.M.S. § 461.540, provides for administrators de bonis non only on the death or resignation of executors or administrators, or on the revocation of their letters. Section 61, § 461.700, provides that the surviving partner shall administer on the deceased partner's estate, or, in case of his neglect or refusal, the executor or administrator of the deceased partner shall so do. *Held*, that where the surviving partner failed to administer the partnership estate, and the deceased partner's estate had been administered, and the administrator had made final settlement and received his discharge, the office of administrator was functus officio, and an administrator de bonis non could not be appointed to administer the partnership estate.

Byers v. Weeks, 79 S.W. 485, 105 Mo. App. 72.

Mo.App. 1907. Under Rev.St.1899, § 46, Ann.St.1906, p. 350, V.A.M.S., § 461.540 as amended by Act March 26, 1903, Laws 1903, p. 52, providing for an administration de bonis non on the discovery after the final discharge of the administrator of unadministered assets, where there are unpaid allowed demands against the estate, etc., an administration be bonis non cannot be granted on the ground of unadministered assets discovered after the final discharge of the administrator, where there are no unpaid demands, and where the assets may be distributed among those entitled thereto without resort to administration.

Pullis v. Pullis, 105 S.W. 275, 127 Mo. App. 294.

Mo.App. 1918. On death of surviving partner before completing partnership administration and in view of Rev.St.1909, §§ 54, 99, V.A.M.S. §§ 461.540, 461.770, probate court might keep administration of his individual estate separate by appointing an administrator de bonis non as to partnership estate.

State ex rel. Dockery v. Hubbard, 203 S.W. 250, 199 Mo.App. 137.

Mo.App. 1948. Under federal statute providing that balance of war risk insurance on death of beneficiary should be paid to insured's estate, amount of insurance remaining unpaid upon beneficiary's death was an unadministered asset of insured's estate, so as to authorize appointment of an administratrix de bonis non. Mo.R.S.A. § 47, V.A.M.S. § 461.540.

State ex rel. Koontz v. Wells, 210 S.W. 2d 387, 240 Mo.App. 457.

⇐37(3). Right to appointment.

Mo.App. 1917. Decedent's creditors, who waited 26 years after final settlement of estate before applying for appointment of administrator de bonis non to sell homestead lands of decedent after death of his widow to pay creditors, *held* not entitled to judgment granting application.

Russell v. Gold's Estate, 195 S.W. 757.

⇐37(4). Jurisdiction and proceedings.

Mo. 1880. The circuit court, on setting aside the final settlement of an administrator on the ground that it contained fraudulent charges cannot order the administrator of the deceased administrator to settle up the affairs of the estate, because the probate court has exclusive jurisdiction to appoint an administrator de bonis non.

Byerly v. Donlin, 72 Mo. 270.

Mo. 1883. The fact that an order of distribution has been made does not oust the jurisdiction of the probate court to appoint an administrator de bonis non.

Morehouse v. Ware, 78 Mo. 100.

Mo. 1897. The facts that allowed claims have not been paid in full, and that there remains property unsold, give a probate court jurisdiction to appoint an administrator de bonis non, though the first administrator has made a final settlement.

Howell v. Jump, 41 S.W. 976, 140 Mo. 441.

Mo. 1901. The power of the probate court to appoint an administrator de bonis non is not defeated by the fact that all the estate debts have been paid.

Francisco v. Wingfield, 61 S.W. 842, 161 Mo. 542.

Mo. 1918. Where administrator in whose favor other heirs renounced right to administer died, probate court's jurisdiction to appoint as administrator de bonis non under Rev.St.1909, § 54, V.A.M.S. § 461.540, another heir, *held* not dislodged by public administrator's filed notice contrary to the fact that he had taken charge of the estate.

State ex rel. Riesmeyer v. Holtcamp, 200 S.W. 294, 273 Mo. 124.

⇐37(5). Operation and effect of appointment.

The appointment of an administrator de bonis non during the vacation of the court is not subject to collateral attack on the ground that the probate court did not, at its next term, enter of record the confirmation or rejection of such letters, as required by Rev.St.1845, p. 62, § 2, when the court did, at its next term, approve the administrator's bond given in vacation, and he subsequent-

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ly manages the estate for a long period of years under numerous orders of the court.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1894. Though an order was made approving the final account of the original administrator, it will be presumed, in favor of the legality of the appointment of an administrator de bonis non, that the estate had not been fully administered, unless the contrary is shown.

Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1919. Where appointment of administrator de bonis non is coram non judice and void, the validity of the appointment can be collaterally attacked.

Wright v. Hetherlin, 209 S.W. 871, 277 Mo. 99.

III. ASSETS, APPRAISAL, AND INVENTORY.

⇐38. Property constituting assets in general.

Mo. 1847. If the tribunals within the jurisdiction of an ancillary administration can distribute or remit the assets found there, the courts having primary jurisdiction of administration cannot interfere with the assets within the limits of the ancillary administration.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

Mo. 1865. The personalty of the deceased goes to the administrator, and not to the heir.

Smith v. Denny, 37 Mo. 20.

Mo. 1910. Real estate passes primarily on the death of the owner to the heirs and devisees, while personal property primarily passes to the executor or administrator, who holds the legal title thereto until the heirs or legatees receive it through process of administration.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo.App. 1938. Even if good will attached to physician's business, based on his superior learning, skill, ability, personality, reputation, and acknowledged prestige, survived his death, it became a part of his estate, and his wife, as an individual, could not convey title thereto to a purchaser from her.

Magee v. Pope, 112 S.W.2d 891, 234 Mo. App. 191.

⇐39. Real property and estates and interests therein.

C.C.Mo. 1905. At common law an estate for years in lands, even though the term is for a longer period than the tenant's life, is personal property, and on the death of the tenant goes to his administrator and executor; but by a statute of Ohio personal leasehold estates renewable forever are made subject to the law of descents governing estates in fee, and therefore descend to the heirs at law of the lessee.

Broadwell v. Banks, 134 F. 470.

On the death of a person, his lands descend to his heirs or devisees, and the personal representatives take no interest therein, but a naked power to sell for the payment of debts.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 482, 93 Am.Dec. 311.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 486.

Mo.App. 1897. Bealey v. Blake's Adm'r, 70 Mo.App. 229.

Title to real estate of an intestate vests directly in his heirs or devisees.

Mo. 1909. Seilert v. McAnally, 122 S.W. 1064, 223 Mo. 505, 135 Am.St.Rep. 522.

Mo. 1915. Potts v. Smith, 178 S.W. 881.

Mo.App. 1894. Adey v Adey, 58 Mo.App. 408.

An intestate's realty passes directly to his heirs and not to his administrator.

Mo. 1937. De Hatre v. Ruenpohl, 108 S.W.2d 357, 341 Mo. 749, transferred to 123 S.W.2d 243.

Mo. 1943. In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1950. Dyer v. Standard Fire Ins. Co. of N. J., 227 S.W.2d 520.

Mo. 1842. An executor or administrator as such cannot maintain an action of ejectment for lands of which the decedent died seised.

Burdyne v. Mackey, 7 Mo. 374.

Mo. 1852. If, in a complaint for the recovery of premises held over after the termination of a lease, the plaintiff describes himself as administrator, he cannot recover, unless he show a demise by himself to the defendant. A demise by his intestate will not sustain the complaint.

Holliday v. Doyon, 15 Mo. 407.

Mo. 1856. The right of action for breach of contract to convey lands to the deceased is in the executor or administrator not in the heirs.

Brueggeman v. Jurgensen, 24 Mo. 87.

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Mo. 1866. A lease for 10 years is a mere chattel interest, which goes to the administrator, and not to the heirs; and in relation to such property ejectment is maintainable by the administrator.

Gutzweiler's Adm'r v. Lackmann, 39 Mo. 91.

Mo. 1871. Military bounty land warrants are considered as real estate, and go, upon the death of the holder, to his heirs at law, and not to his executors or administrators.

Johnson v. Parcels, 48 Mo. 549, appeal dismissed 20 Wall. 653, 22 L.Ed. 410.

Mo. 1883. An equitable interest in land passes to the administrator, and is assignable by him.

Atkison v. Henry, 80 Mo. 670.

Mo. 1892. In a proceeding in equity by the heirs of a decedent to recover a dwelling house, the petition contained the averments that the lot on which the house in question stood was the property of defendant, and the house was the property of plaintiffs' decedent, which at her death passed to them as her heirs. *Held*, that by these averments the house is personal property, which passes to the administrator of plaintiffs' decedent, who alone has the right of action.

Brown v. Turner, 20 S.W. 660, 113 Mo. 27.

Mo. 1910. An unexpired lease of real property for 20 years or any longer term is "personal property," both at common law and under the statutes of Missouri, and therefore, on the death of the lessee, passes to his administrator, except as to the interest of the widow, under Rev.St.1809, § 2933, Ann.St. 1906, p. 1690, V.A.M.S. § 469.010, giving her dower in a leasehold.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1910. Under the statute the real estate of a decedent descends to his heirs, and the probate court has no administrative jurisdiction over it, except to lease or sell it to pay debts.

Smith v. Black, 132 S.W. 1129, 231 Mo. 681.

Mo. 1915. An unexpired lease of real property for 20 years is only "personal estate," notwithstanding statutes providing that leaseholds for 20 years or more shall be assigned for dower in same manner as real estate.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 175 S.W. 884, 264 Mo. 554.

Mo. 1920. An administrator who has taken no steps in the probate court to have the real estate or the rents thereof inventoried or applied to the payment of debts, and has not accounted for rents for the time he occupied the property, has no interest in the real estate in view of Rev.St.1909, § 139, V.A.M.S. § 462.280.

Anderson v. Taylor, 227 S.W. 84.

Mo. 1935. Generally, real estate, on owner's death intestate, vests at once in heirs and not in administrator.

Wass v. Hammontree, 77 S.W.2d 1006.

Mo.App. 1878. Propriety of administration of remainder in real estate on death of life tenant, under a will disposing of the remainder after death of the life tenant. See, In re Huckstep's Estate, 5 Mo.App. 582, memorandum.

Mo.App. 1893. Testator devised his real estate to his wife for life, with remainder to his heirs. His executor made final settlement of his accounts during the continuance of the life estate. After the death of the life tenant, the executor of testator sued the tenants of the life tenant for rents accrued since her death. *Held*, that he had no right of action.

Landree v. Warren, 53 Mo.App. 442.

Mo.App. 1940. A "mortgage" or "deed of trust" is but chattel interest, right to money payable by mortgagor passes to deceased mortgagee's personal representative, whose receipt therefor is good against mortgagee's heir, mortgagor's wife, but not mortgagee's wife, is dowable, mortgaged estate may be sold to pay mortgagor's debts, but not for mortgagee's debt, debt secured cannot be separated from mortgage, and mortgagee, after forfeiture for breach of condition, may maintain ejectment against mortgagor to recover estate so that mortgagee may have benefit of rents and profits therefrom.

Wakefield v. Dinger, 135 S.W.2d 17, 234 Mo.App. 407, transferred 130 S.W.2d 490.

Mo.App. 1943. The administrator has no power over the real estate except so far as to hold it for the payment of the debts of the deceased.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

Mo.App. 1945. Executors who were also testamentary trustees had the duty as executors to collect chattels, etc., but had no right to control the realty, except under a statutory order of the probate court if necessary to rent the realty to pay debts. Rev.St.

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1919, §§ 56, 129, Mo.R.S.A. §§ 57, 129, V.A.M.S. §§ 462.010, 462.280.

In re Beauchamp's Estate, 184 S.W.2d 729.

Mo.App. 1945. Personal representative acquires no interest in realty of decedent, except in case of executor acting under power specifically conferred by will, and may not lawfully take possession of or control realty unless on order of probate court that it be rented or sold for payment of debts where it is shown that personal estate is insufficient.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

Mo.App. 1948. On decedent's death title to his realty vested in his son and sole heir, and his son as administrator acquired no interest in the realty and was without right to take possession thereof or to collect rents therefrom, in absence of an order from probate court.

Wocet v. Seacat, 212 S.W.2d 449.

The right to possession of premises leased by decedent to defendant was vested in decedent's son, who was his sole heir, and could not be asserted by son in his capacity as administrator.

Wocet v. Seacat, 212 S.W.2d 449.

⇐40. Proceeds of sale of real property.

Mo. 1827. After a sale of land devised to be sold for payment of debts, the money arising therefrom becomes legal assets.

Governor of Missouri, to Use of Hill, v. Chouteau, 1 Mo. 731.

Mo. 1858. Where an agent was authorized to sell a pre-emption claim belonging to his principal, and he sold the land and received the purchase money, and the sale was made after the death of the principal, but in ignorance thereof, and the purchase money was paid after knowledge by the agent and by the purchaser of the death of the principal, the administrator of the principal was entitled to recover of the agent the money so received.

Carriger's Adm'r v. Whittington's Adm'r, 26 Mo. 311, 72 Am.Dec. 212.

Mo. 1901. Where land was sold on foreclosure of a trust deed after the death of the grantor, it was improper for the trustee to pay any part of the surplus to the grantor's widow, but it should have been paid to the administrator of the grantor's estate, to be distributed as assets.

Curtis v. Moore, 63 S.W. 80, 162 Mo. 442.

Mo.App. 1883. Where a husband and wife gave a trust deed on their homestead, and after his death the land was sold, the excess over the debt received by the trustee went into the estate as personalty, and was to be regarded as such by the administrator and the probate court.

Woerther v. Miller, 13 Mo.App. 567.

Mo.App. 1885. Plaintiff sued for partition, obtained a decree, the land was sold, and the proceeds paid to the persons entitled thereto, except the share of one heir, who did not appear to claim his share. Some years after the plaintiff sued the sheriff for the share of this heir, alleging him to be dead and claiming it as next of kin. *Held*, that the administrator of the heir alleged to be deceased, and not his next kin, was entitled to the share.

State ex rel. Hounson v. Moore, 18 Mo. App. 406.

Mo.App. 1891. The proceeds of the sale of lands of a decedent, whether sold under the terms of a deed of trust executed during the lifetime of the decedent, or sold by order of court to pay debts, go to the heirs, subject to the payment of the debts, and cannot be used to make good a deficiency in the widow's allowance, under Rev.St.1879, § 107 et seq.

In re Lloyd's Estate, 44 Mo.App. 670.

Mo.App. 1893. Where, in a partition suit, land is sold for the purpose of distributing the proceeds among heirs, such proceeds become personalty, and an administrator of a deceased heir may sue therefor.

State ex rel. Hey v. Harper, 54 Mo.App. 286.

Mo.App. 1902. Where a person dies seised of real estate incumbered by a mortgage, and the mortgage is thereafter foreclosed, the surplus is regarded as realty, and goes to the heirs of the decedent, instead of to his personal representatives.

Kreyling v. O'Reilly, 71 S.W. 372, 97 Mo. App. 384.

Mo.App. 1927. Where one dies seized of real estate on which existing trust was foreclosed, surplus belongs to heirs, to be disposed of as real property.

Arrowood v. Delaney's Estate, 295 S.W. 522.

⇐41. Rents and profits.

C.C.Mo. 1905. In the absence of statute, rents which accrued during the lifetime of the lessor, or which have accrued at the time of his decease, are personal property, and pass to his personal representatives as assets of the estate, and not to his heirs at

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law or a legatee under his will; and, in the absence of any contrary statute or testamentary provision, the rents accruing after the lessor's death go to his heirs or devisees, and are not assets in the hands of his personal representative.

Broadwell v. Banks, 134 F. 470.

The administrator of an intestate, and not the heir, must sue for use and occupation.

Mo. 1823. Rector v. Ranken, 1 Mo. 371.

Mo. 1856. Logan's Adm'r v. Caldwell, 23 Mo. 372.

Mo. 1856. The heir must sue for rent, where there is a lease.

Logan's Adm'r v. Caldwell, 23 Mo. 372.

Mo. 1897. The lands of a decedent descend to his heirs or the devisees under his will, and the possession of the land and defense of the title, and all of its incidents, belong to the heirs or devisees, and the personal representative has no concern in the matter.

Thorp v. Miller, 38 S.W. 929, 137 Mo. 231.

Mo. 1942. If a one-third interest in realty was held by one of defendants in trust for plaintiffs' decedent, then after decedent's death it was held in "trust" for her widower and legal heirs, and administrator of decedent's estate would not be entitled to rental value of the realty except such as had accrued prior to her death without a prior order of probate court. Mo.R.S.A. § 129, V.A.M.S. § 462.280.

Niederberg v. Golluber, 162 S.W.2d 592.

Mo.App. 1876. Where an executor has taken charge of and leased property belonging to the estate, although without a formal order of the probate court, the rents are assets in his hands, for which he and his bond are liable.

Gamage v. Bushell, 1 Mo.App. 416.

Mo.App. 1876. If an administrator leases land belonging to an estate without authority from the probate court, the rents received by him are nevertheless assets in his hand, and he must account in his settlement for rents so received.

Hartnett v. Fegan, 3 Mo.App. 1.

Mo.App. 1887. Unaccrued rents of land after the death of the owner or lessor go to the heir, and not to the administrator.

Shouse v. Krusor, 24 Mo.App. 279.

Mo.App. 1894. At common law, as rent follows the reversion or ownership of the land, no apportionment would be made, but the monthly, quarterly, or annual rent would follow the land, and belong to the owner at the time it accrues. This rule has not been changed by statute, but, on the contrary, it finds recognition in Rev.St. §§ 6373, 6397, 6398, V.A.M.S. §§ 441.150, 535.070, 535.080.

Page v. Culver, 55 Mo.App. 606.

Mo.App. 1897. Rents accruing for the use of land prior to the owner's death vest in his administrator; but rents and profits accruing after the owner's death pass to his heirs, and not to the administrator.

Bealey v. Blake's Adm'r, 70 Mo.App. 229.

Rents accruing after the death of the owner or lessor are not "debts," which the statute requires the administrator to inventory, take possession of, and collect.

Bealey v. Blake's Adm'r, 70 Mo.App. 229.

Mo. 1907. Where there has been no order of the probate court requiring or authorizing an administrator to lease lands for the purpose of paying debts or for any other purpose, the rents and profits received from the lands belong to the heirs instead of the estate.

Cleveland Co-operative Stove Co. v. Baldwin, 99 S.W. 47, 121 Mo.App. 397.

Mo.App. 1948. On decedent's death title to his realty vested in his son and sole heir, and his son as administrator acquired no interest in the realty and was without right to take possession thereof or to collect rents therefrom, in absence of an order from probate court.

Wocet v. Seacat, 212 S.W.2d 449.

Rents accruing prior to decedent's death vested in his administrator as assets of estate, but rents accruing thereafter vested in his son as sole heir of the realty.

Wocet v. Seacat, 212 S.W.2d 449.

⇐42. Crops and products of land.

Mo. 1858. Where testator devised a plantation to certain of his grandchildren, and then directed his executor to sell other real estate and also all the perishable part of his estate, including, among other items mentioned, "crops on hand" and all other personal property not otherwise disposed of, a crop growing on the plantation at the time of the death of the testator passed to the grandchildren as devisees, and not to the executor.

Pratte v. Coffman's Ex'r, 27 Mo. 424.

Under the statute, where the widow has no dower assigned to her, the growing crop on the land of her deceased husband goes

to his executor or administrator, and not to the widow.

Mo. 1872. Whaley v. Whaley, 51 Mo. 36.

Mo. 1872. Morris v. Thomas, 51 Mo. 159.

Mo.App. 1938. Growing crops on land belonging to testator go to devisees of the land and not to the executor.

Blum v. Frost, 116 S.W.2d 541, 234 Mo. App. 695.

⇐43. Personal property in general.

The administrator is entitled to intestate's personal property as against the widow and heirs.

Mo. 1909. Seilert v. McAnally, 122 S.W. 1064, 223 Mo. 505, 135 Am.St.Rep. 522.

Mo.App. 1907. Darr v. Thomas, 106 S.W. 95, 127 Mo.App. 1.

Mo.App. 1909. Crohn v. Clay County State Bank, 118 S.W. 498, 137 Mo.App. 712.

Mo.App. 1918. Messenbaugh v. Goll, 202 S.W. 265, 198 Mo.App. 698.

The title to personal property of a decedent vests in the personal representative until distributed.

Mo. 1856. Brueggeman v. Jurgensen, 24 Mo. 87.

Mo.App. 1881. Rouggley v. Teichmann, 10 Mo.App. 257.

Mo. 1826. A deed executed by several persons for a slave, when all of them are heirs and part of them administrators of the person to whom the slave belonged, in which it was not stated in which character the conveyance was made, cannot be read in evidence to show title in the purchaser, but the conveyance should have been made by the administrator as such.

Little's Adm'r v. Chauvin, 1 Mo. 626.

Mo. 1828. Slaves belonging to the estate of deceased persons go to the administrator, to be by him disposed of as the law directs.

McDonald v. Walton, 2 Mo. 48.

Mo. 1859. One S. died in Kentucky in 1826. No administration in form was had upon his estate, but his widow and heirs divided his property, and a certain female slave, named "Milly," was, with other property, assigned to the widow. About 10 years after the death of her said husband the widow removed to the state of Missouri, bringing with her said slave Milly and her children. She died in 1855, and by her will disposed of said Milly and her children. Letters of administration were afterwards taken out upon the estate of S. *Held*, that the administrators of S. were the proper parties plaintiff in a suit brought for the possession of said slaves in behalf of the representatives of said S.

Salmon's Adm'rs v. Davis, 29 Mo. 176.

Mo. 1865. Personal property passes to the administrator, not to the heir.

Smith v. Denny, 37 Mo. 20.

Mo. 1910. Unexpired lease of real property for 20 years or longer term is "personal property," and therefore, on death of lessee, passes to administrator, except as to interest of the widow.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1919. A corporation having money on deposit, which is taken possession of by its receiver, who deposits the amount to his credit, is not, on death of the receiver, entitled to the deposit, but it is payable only on the check of his executor or administrator.

State ex rel. Elberta Peach & Land Co. v. Chicago Bonding & Surety Co., 215 S.W. 20, 279 Mo. 535.

Mo. 1934. Title to personalty passes to administrator, and in absence of order of distribution, heirs have no interest therein.

Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242.

Mo. 1935. Personal property, inclusive of choses in action, goes primarily to administrators or executors, and not to heirs.

Wass v. Hammontree, 77 S.W.2d 1006.

Mo. 1943. The legal title to a decedent's personalty passes primarily to his executor or administrator, from whom the heirs or legatees receive it through administration, and the administrator or executor represents not only the heirs and legatees, but also the law and creditors. Mo.R.S.A. §§ 2, 57, 94, 98, 180, 230, 249, 306, V.A.M.S. §§ 461.120, 462.010, 462.140, 461.640, 463.430, 465.170, 468.010, 537.010.

Odom v. Langston, 173 S.W.2d 826, 351 Mo. 609, transferred 170 S.W.2d 589, 237 Mo.App. 721, transferred 159 S.W. 2d 686.

Mo. 1949. An executor or administrator has legal title to estate personalty and right to possession thereof during pendency of administration until distribution is ordered and it is his duty to collect and defend it in court if necessary, except where controversy is personal to distributees inter sese or otherwise, and his status as such will authorize him to bring a suit in conversion of estate personalty.

State ex rel. Lipic v. Flynn, 215 S.W. 2d 446, 358 Mo. 429.

Mo.App. 1885. Both at law and in equity the whole personal estate vests in the executor or administrator.

State ex rel. Hounson v. Moore, 18 Mo. App. 406.

Mo.App. 1894. On the death of an owner personalty descends to his personal representatives, though there are no debts, and the claimant to the personalty is the sole distributee.

Adey v. Adey, 58 Mo.App. 408.

Mo.App. 1902. An administrator has title only to the personal assets of the estate of his decedent, and those assets consist only of money, goods, and chattels which were owned by decedent or to which he had a right of action, either legal or equitable, in his lifetime and at his death.

Supreme Council Royal Arcanum v. Kacer, 69 S.W. 671, 96 Mo.App. 93.

Mo.App. 1905. Where, on the death of a person intestate, the probate court did not dispense with an administrator by order, as authorized by Rev.St.1899, § 2, V.A.M.S. § 461.120, intestate's personal property passed to her administrator, and not to her heirs.

Perkins v. Goddin, 85 S.W. 936, 111 Mo. App. 429.

Mo.App. 1910. The deposit funds of a private bank went, on the death of the banker, who was sole owner of the assets, into his estate, the executor being the only person entitled to take possession of such funds.

In re Purl's Estate, 125 S.W. 849, 147 Mo.App. 105.

Though legal title to personalty of deceased descends to the administrator, administrator is merely a trustee for the benefit of creditors, legatees, heirs and distributees and the equitable title is in them.

Mo.App. 1946. Bostian v. Milens, 193 S.W.2d 797, 239 Mo.App. 555, 170 A. L.R. 424, appeal transferred 188 S.W. 2d 945, 354 Mo. 153.

Mo.App. 1949. Williams v. Patterson, 218 S.W.2d 156, 240 Mo.App. 131.

Mo.App. 1949. The legal title to decedent's personal property descends to administrator or executor of decedent's estate, and such property is held in trust for benefit of creditors and those entitled to inherit or take it as heirs of estate.

Rone's Estate v. Rone, 218 S.W.2d 138.

⇐44. Interests in partnerships.

Mo.App. 1918. If surviving partner had not qualified under Rev.St.1909, § 91, V.A.M.S. § 461.080, as administrator of partnership estate, but had acted under his common-law authority, the right of administering such estate would, upon his death, devolve upon his administrator.

State ex rel. Dockery v. Hubbard, 203 S.W. 250, 199 Mo.App. 137.

⇐45. Trust estates and other equitable estates and interests.

Mo. 1838. On the death of a wife, the legal estate in slaves conveyed to a trustee by an antenuptial conveyance for the use and benefit of the wife continues in the trustee for the use and benefit of the personal representatives of the wife, who are to be determined by reference to the statute of descents.

Pratt v. Wright, 5 Mo. 192.

Mo. 1876. Where the name of a decedent appeared as trustee in a deed of trust in favor of his daughter, the administrator of such trustee had the burden of proving by clear and convincing evidence that the decedent was the beneficial owner of the debt secured by the deed of trust, and that he had the right to collect the same for the benefit of the estate.

Gimbel v. Pignero, 62 Mo. 240.

Mo. 1883. An equitable interest in lands passes to the administrator and is assignable by him.

Atkison v. Henry, 80 Mo. 670.

Mo. 1944. Where, under trust deed executed by father, eldest son was authorized to determine at distribution date in what manner, degree, and terms another son's share might be vested in him, and eldest son had such share conveyed to trustee for benefit of other son with remainder to his heirs, the limitation of remainder to heirs was authorized by father's trust deed so that on death of other son his administrator acquired no interest in property.

St. Louis Union Trust Co. v. Clarke, 178 S.W.2d 359, 352 Mo. 518.

Mo.App. 1886. Where, among the assets received by an administrator, there were moneys which intestate held as trustee, the fact that the administrator paid over such moneys without authorization of the probate court afforded no ground for charging the administrator and his sureties for waste or mismanagement of the estate, within Rev.St. § 290, giving an action on an administrator's bond to "any party injured."

State ex rel. Boughton v. Tubb, 22 Mo. App. 91.

Mo.App. 1921. On the death of the maker of notes who had pledged collateral to secure

them, the payee bank had possession and control of the collateral as pledgee, but the estate of the pledgor retained an interest therein, as to which the pledgee bank became a trustee, and purchasers of the notes and collateral from the bank became, in like manner, trustees with reference to the interest therein of the estate of the pledgor, deceased, which interest on the pledgor's death passed to his administrators, and any surplus value in the collateral became a trust fund to be administered for the benefit of the creditors of the insolvent estate of the deceased pledgor.

Hornsby v. Knorpp, 232 S.W. 776, 207 Mo.App. 302.

Mo.App. 1928. Voluntary wrongful act in selling trust property did not make proceeds part of trustee's estate.

Clay v. Walker, 6 S.W.2d 961.

Mo.App. 1932. Where employer elected to treat employee, in whose name property was purchased, as a debtor, indebtedness, although growing out of trust relationship, became money demand against employee's estate over which probate court had jurisdiction.

Abernathy v. Hampe, 53 S.W.2d 1090.

Mo.App. 1934. Upon death of beneficiary of resulting trust, his interest descends as realty to his heirs and, in absence of debts, beneficiary's administrator is not concerned with enforcement of trust.

Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.

⇐46. Interest under insurance policies.

C.C.A.Mo. 1939. The right to proceeds of life insurance policy, which remained payable to insured's wife on its face until his death, vested in her at time thereof, and hence did not become part of his estate and were not subject to administration by executor under his will directing division of proceeds among his wife and others.

Nance v. Hilliard, 101 F.2d 957.

Mo. 1947. The proceeds of life insurance policy, payable to named beneficiary, were not part of deceased insured's estate being administered by executors in probate court.

Priedeman v. Jamison, 202 S.W.2d 900, 356 Mo. 627.

Mo.App. 1890. Upon the death of the ancestor intestate, the realty becomes the absolute property of the heir, subject to the payment of the debts, and, where loss is occasioned by the burning of a house after the death of the ancestor, it is the loss of the heir; the administrator being a trustee of an express trust, entitled to sue for the benefit of the heir.

Sauner v. Phœnix Ins. Co., 41 Mo.App. 480.

Mo.App. 1903. Evidence, in a suit by an administrator against decedent's creditor to compel an accounting of the proceeds of a life insurance policy, examined, and *held* to show that the policy was taken out by the decedent to secure the creditor, and not by the creditor in its own right.

Strode v. Meyer Bros. Drug Co., 74 S.W. 379, 101 Mo.App. 627.

Mo.App. 1909. Where one has an undivided interest in a paid-up policy of another the insurance money is an asset of his estate after insured's death and payment by insurer, though he died before insured.

In re Ulrici's Estate, 122 S.W. 761, 145 Mo.App. 463.

Mo.App. 1938. In action by insured's administrator to recover on industrial life policies, where payment had been made to insured's daughters under facility of payment clause, and daughters were beneficiaries of the policies under insured's will, administrator was not entitled to proceeds in absence of proof that unpaid claims existed against insured's estate, which could not be paid out of assets which were not specifically bequeathed.

Rohde v. Metropolitan Life Ins. Co., 111 S.W.2d 1006, 233 Mo.App. 865.

Mo.App. 1940. Administratrix was not authorized to take charge, as assets of the estate, of proceeds from life policy payable to heirs.

In re Helm's Estate 136 S.W.2d 421.

Mo.App. 1950. Insurance money did not become part of estate and executors were not accountable for such money by virtue of agreement that beneficiary of policy, who was also beneficiary under will, should pay money to named person to make distribution in accordance with terms of contract.

Schoen v. Wagner, 231 S.W.2d 269.

⇐47. Legacies and distributive shares.

Mo. 1855. Where the personal property belonging to the estate of the husband is converted into money, and the widow dies without receiving her portion, and there has been no administration on the widow's estate, it would be error to order the money to be paid to the children of the widow as her representatives, or to their guardian for them, as the widow's estate should be distributed to her administrator.

Hastings v. Myers' Adm'r, 21 Mo. 519.

Mo. 1862. Where the administrator of an estate, upon final settlement, was ordered to pay to the parties entitled by law, and the intestate left two children, one of whom died pending the administration, upon whose estate letters were granted, it was *held* that the personal representative of the deceased child was entitled to demand the portion of the estate in the hands of the first administrator, and that a payment to her next of kin was no defense to a suit for the half of such balance.

Hanenkamp's Adm'r v. Borgmier, 32 Mo. 569.

Mo.App. 1881. Where a residuary legatee of a testator, in whose favor a demand had been allowed against an estate, dies, the legal title to his share of the demand cannot be assigned by his next of kin, so as to give the assignee right to enforce the same, till such next of kin has received it as proceeds of the administration of the estate.

Rouggley v. Teichmann, 10 Mo.App. 257.

A grant of letters of administration upon the estate of a deceased legatee would vest in the administrator the legal claim to such legatee's share in uncollected claims, and his right to sue would be exclusive of all claims of the children of such deceased legatee, and therefore such children cannot by assignment give a good title to such demands.

Rouggley v. Teichmann, 10 Mo.App. 257.

⇐48. Debts and rights of action.

⇐49. —— In general.

D.C.Mo. 1933. Right of action, if any, against insurer for cancellation of insurance policies while insured was insane, *held* vested in beneficiary and no part of insured's estate. Mo.St.Ann. § 94, p. 57, V.A.M.S. § 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

Mo. 1834. An administrator with the will annexed may sue for a breach of covenant made to the testator to convey the land.

Laberge v. McCausland, 3 Mo. 585.

Mo. 1856. An action cannot be maintained by an executor or administrator as such to recover damages for trespass upon realty belonging to the estate of the testator or intestate. Such action should be brought in the name of the heir or devisee.

Aubuchon v. Lory, 23 Mo. 99.

Mo. 1856. Title to personal property vests in the administrator, and the right of action for breach of a contract to convey land, made with a decedent, is not in the heirs, but in the executor or administrator.

Brueggeman v. Jurgensen, 24 Mo. 87.

Mo. 1876. The administrator of a deceased grantee may recover for a breach of warranty against incumbrances.

Kellogg v. Malin, 62 Mo. 429.

Mo. 1936. A "judgment" is a debt, a property right which goes, upon owner's death, to his personal representative regardless of what may have been cause of action upon which it was obtained, and after giving of judgment controversy is over the judgment, and not over the original wrong.

Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.

Mo. 1947. Estate of deceased guarantor had no greater right to reimbursement from principal for amount paid on guaranty than guarantor would have had had he lived.

In re Jamison's Estate, 202 S.W.2d 879.

Mo.App. 1885. A contract providing that one party should build a party wall, which the other should have a right to use on paying half of the cost thereof, does not give the heirs of the party building the wall any right to the compensation, but such right devolves on such party's personal representatives.

Huling v. Chester, 19 Mo.App. 607.

Mo.App. 1907. Under Rev.St.1899, § 96, Ann.St.1906, p. 369, V.A.M.S. § 537.010, where a cause of action for damages to realty accrued during the lifetime of a deceased party, it descended to his administrator, and not to his heirs at law.

Mitchell v. St. Louis, I. M. & S. R. Ry. Co., 101 S.W. 127, 123 Mo.App. 545.

Mo.App. 1910. Under an antenuptial contract providing that the wife would have the right to bring up the offspring in the Catholic Faith even if she dies, the right of the wife is not a property right that would pass to and be enforceable by the personal representative of the wife.

Brewer v. Cary, 127 S.W. 685, 148 Mo. App. 193.

Mo.App. 1911. An administrator of a decedent was appointed. There were debts due from the estate. The heirs and widow agreed to divide a part of decedent's personalty except notes delivered by him as collateral, which notes should pass to the estate. The debt for which the note was pledged was paid, and the administrator took charge of the note and inventoried it as an asset of the estate. *Held*, that the title to the note was in the ad-

ministrator, who was the proper party to sue thereon.

Todd v. James, 138 S.W. 929, 157 Mo. App. 416.

Mo.App. 1915. A promise by a seller of corporate stock to repurchase at the option of the buyer *held* enforceable by the buyer's executors.

Klein v. Johnson, 178 S.W. 262, 191 Mo. App. 453.

Mo.App. 1920. A father's action for expenses because of defendant's wrongful personal injury of plaintiff's minor son may be continued after plaintiff's death by his administrator, since such expenses are a part of the estate's assets, and the same is true as to services of the minor son, lost prior to father's death, although not as to subsequent loss of services. Rev.St.1909, § 105, V.A.M.S. § 537.010.

Esstman v. United Rys. Co. of St. Louis, 220 S.W. 508.

Mo.App. 1926. All right, title, and interest in judgment assigned to one since deceased passes to his executrix on appointment, by operation of law.

B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo.App. 510.

⇐50. —— Debts due from executor or administrator.

Mo. 1868. Where a banking house issued a certificate of deposit to a person who afterwards died, and one of the partners in the banking house was appointed administrator, the debt from the banking house was assets in the administrator's hands, under Administration Act, Rev.Code 1855, p. 133, art. 2, § 28, declaring that all debts due by an administrator to his intestate shall be considered as assets in his hands, although the certificate never came into his possession.

Eaton v. Walsh, 42 Mo. 272.

Mo. 1876. Debts due from an executor to decedent should, under Wag.St. p. 84, § 2, be included in the inventory as other assets of the estate.

McCarty v. Frazer, 62 Mo. 263.

Mo.App. 1917. Rev.St.1909, §§ 107, 108, V.A.M.S. §§ 462.170, 462.180, providing that administrator's debts to estate shall be "assets" in his hands, does not mean that they shall be considered as money.

Weber v. Oviatt, 194 S.W. 80.

⇐51. —— Right of action for death of decedent.

Mo. 1884. Under Rev.St.1879, §§ 2121–2123, providing that, where the death of a person is occasioned by negligence, an action for damages caused by such death may be maintained by the husband or wife of the deceased, or if there be no husband or wife, or if he or she fails to sue within six months after the death, then by the minor child or children of the deceased, or if the deceased be a minor and unmarried, then by the father and mother, no action for death by wrongful act can be maintained by an administrator as such.

Gibbs v. City of Hannibal, 82 Mo. 143.

Mo.App. 1914. Under Rev.St.1909, §§ 5425–5427, V.A.M.S. §§ 537.070–537.090, giving an action for damages for wrongful death, *held*, that the amount recoverable was not an asset of decedent's estate, but belongs to the persons designated therein, and where the suit is brought by the administrator, he is a mere trustee to maintain the action for those entitled to the damages sought to be recovered.

Troll v. Laclede Gaslight Co., 169 S.W. 337, 182 Mo.App. 600.

Mo.App. 1946. An "estate" is the interest which anyone has in lands or in any other subject of property, and damages for wrongful death are no part of decedent's "estate". Mo.R.S.A. § 3652, V.A.M.S. § 537.070.

Donelson's Estate v. Gorman, 192 S.W. 2d 29, 239 Mo.App. 300.

⇐52. —— Evidence of indebtedness.

Mo. 1869. A provision, in a statute for the relief of certain parties, that a warrant upon the treasury shall be paid "upon presentation thereof by H., or his agent, with the signature of the said H. indorsed thereon," merely defines the mode of payment, and seems to be intended to guard against a sale of the claim, and nothing more. It does not have the effect of limiting the claim to H. personally, and his personal representative is entitled to demand and receive payment.

Hickey v. Dallmeyer, 44 Mo. 237.

Mo. 1891. Defendant was sued to recover assets and money due from him to his father's estate. The evidence showed that the father and mother had deeded land to him for $6,000, and that about a year thereafter he had executed a deed of trust to secure a note for $6,000 to a third party on other land, and there was no evidence connecting the two transactions. *Held* insufficient to support a verdict against defendant.

McCartney v. Finnell, 17 S.W. 446, 106 Mo. 445.

Though defendant stated that his niece would get $3,000 when his mother died, yet this, standing alone, would not show that he had money in his hands belonging to his father's estate.

McCartney v. Finnell, 17 S.W. 446, 106 Mo. 445.

Where plaintiff was the administrator of the father's estate only, the fact that defendant had money in his hands belonging to his mother's estate would not support the action.

McCartney v. Finnell, 17 S.W. 446, 106 Mo. 445.

Mo.App. 1882. An executor has title to a note belonging to the estate of the testator.

Balmer v. Sunder, 11 Mo.App. 454.

Mo.App. 1896. The son of a deceased payee of notes has no interest in the notes before administration.

Jacobs v. Maloney, 64 Mo.App. 270.

Mo.App. 1897. After the death of the payee of a note, his widow handed his papers to his administrator. Among the papers was a note payable to decedent or his wife, and nothing was said by the widow about the note. *Held*, that there was nothing in this to show that the widow voluntarily gave up the note to the administrator.

Wells v. Moore, 68 Mo.App. 499.

⇐53. Exempt property.

For cases from other jurisdictions, see other Key Number Digests.

⇐54. Ownership of property at time of death.

⇐55. —— In general.

Mo. 1855. Where a party has been for several years in possession of goods loaned to him, his administrator cannot, for the benefit of the intestate's creditors, impeach the lender's title.

Criddle's Adm'r v. Criddle, 21 Mo. 522.

Mo. 1891. A testator held contracts from brokers for the sale to him of certain railroad stock. He never demanded a delivery of the stock, and at the time of his death the brokers had possession or control of the stock, and the larger part of the price was unpaid. *Held*, that the contracts and not the stock, were the assets of the testator.

Hitchcock v. Mosher, 17 S.W. 638, 106 Mo. 578.

The fact that plaintiff obtained from the probate court an order authorizing him to sell the stock, and the brokers signed such order, could not make the stock assets of the estate.

Hitchcock v. Mosher, 17 S.W. 638, 106 Mo. 578.

That the legatees under the will signed the order authorizing plaintiff to sell the stock did not vest in him title to or control over the stock.

Hitchcock v. Mosher, 17 S.W. 638, 106 Mo. 578.

Mo.App. 1937. A note indorsed and delivered to bank by payee as collateral security for latter's indebtedness to bank was payee's property when she died and became asset of her estate, bank not being absolute owner thereof, but trustee with respect to payee's interest therein.

Studer v. Harlan, 109 S.W.2d 687, 233 Mo.App. 811.

Mo.App. 1938. In absence of wife's written assent, personalty acquired by her during coverture cannot become the property of her husband even though he purports to reduce the property to his own possession, and, having never been his property, cannot be part of his estate to be administered on, unless the wife should elect to waive the trust otherwise existing and should seek to recover as an ordinary creditor by demand against the estate. Mo.St.Ann. §§ 325, 3003, pp. 212, 5064, V.A.M.S. §§ 451.250, 469.090.

Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

Mo.App. 1951. Where husband and wife came to their death simultaneously and at that time they were the owners as tenants by the entirety of the homestead and were joint owners of certain personal property, and the only surviving heirs of either of them consisted of brothers and sisters, the estate of the wife was entitled to one half of the cash in a safety deposit box which was in the name of husband and in the name of the wife as a deputy. V.A.M.S. §§ 471.010 et seq., 471.030, 510.310.

Adams v. Gardener, 237 S.W.2d 495.

⇐56. —— Property disposed of by decedent.

Mo. 1879. The heirs of a deceased donor are proper parties to sue to set aside a gift of deceased as having been obtained by undue influence.

Ford v. Hennessy, 70 Mo. 580.

Mo. 1880. On a sale of goods the buyer agreed to pay therefor by delivering farm produce to the seller's wife. The seller made the sale in anticipation of death. *Held*, that on his death his widow was entitled to the benefit of the contract, and the executor had no right thereto.

Scruggs v. Alexander, 72 Mo. 134.

Mo.App. 1897. In a proceeding under Rev.St.1889, § 74, V.A.M.S. § 462.400, which provides that if an administrator file an affidavit in the proper court, stating that the affiant has good cause to believe that any person has concealed or embezzled, or is otherwise wrongfully withholding, any goods, chattels, money, books, papers, or evidences of debt of the deceased, and has them in his possession

or under his control, the court may cite such person to appear before it, and compel such appearance by attachment, where it is sought to charge defendant with having concealed, embezzled, or wrongfully withheld certain notes alleged to belong to a decedent, and defendant claims the notes as a gift from the decedent, an instruction that the charge made is one of embezzlement of assets belonging to the estate of a decedent, and that if the jury believe, from the evidence in the case, that defendant was in lawful possession of the notes, etc., prior to death of said decedent, claiming title thereto in good faith, their verdict must be for defendant, is proper.

Hoehn v. Struttmann, 71 Mo.App. 399.

Mo.App. 1901. A decedent's title when he dies is the criterion of the title which devolves on his administrator.

Tye v. Tye, 88 Mo.App. 330.

Notwithstanding a contract by which a decedent had agreed to give all her personal property to another at her death, in consideration of her making her home with such party during her life, the title to a note belonging to her passed to her administrator as an asset of her estate, subject to the jurisdiction of the probate court.

Tye v. Tye, 88 Mo.App. 330.

Mo.App. 1908. A decedent, in anticipation of death, transferred his property to his brother, with directions as to its distribution among others; but the evidence was too indefinite as to the details to establish a trust. *Held*, that the brother had no right to or ownership of any part of the estate, but under the law it was the property of an unadministered estate, subject to debts, etc.

Crowley v. Crowley, 110 S.W. 1100, 131 Mo.App. 178.

⇐57. —— Property fraudulently conveyed.

Under the laws of Missouri, lands fraudulently conveyed form no part of the estate of deceased grantors, and the probate court has no jurisdiction to order them sold for the payment of debts.

C.C.A.Mo. 1912. Byrd v. Hall, 196 F. 762, 117 C.C.A. 568.

C.C.A.Mo. 1912. Sugg v. Eskew, 196 F. 767, 117 C.C.A. 577.

A personal representative of decedent cannot impeach a transfer made by him, though it is fraudulent as to creditors.

Mo. 1852. McLaughlin v. McLaughlin's Adm'r, 16 Mo. 242.

Mo. 1858. George v. Williamson, 26 Mo. 190, 72 Am.Dec. 203.

Mo. 1869. Merry v. Fremon, 44 Mo. 518.

Mo. 1877. Hall v. Callahan, 66 Mo. 316.

Mo. 1882. Zoll v. Soper, 75 Mo. 460.

Mo.App. 1879. Lewis v. American Life Ins. Co., 7 Mo.App. 112.

Mo.App. 1888. Goldstein v. Winkelman, 28 Mo.App. 432.

Mo. 1853. An administrator cannot impeach a gift of his intestate, on the ground that it was made to defraud creditors, although the estate may be insolvent.

Brown's Adm'r v. Finley, 18 Mo. 375.

Mo. 1904. An administrator cannot assail the conveyance of his intestate for fraud of the intestate.

Stam v. Smith, 81 S.W. 1217, 183 Mo. 464.

Mo.App. 1888. An administrator has the right in his individual capacity as a judgment creditor to impeach in an equitable action the good faith of the transfer of a note by his intestate.

Goldstein v. Winkelman, 28 Mo.App. 432.

Mo.App. 1901. An instruction declaring that a mortgage, being void as to creditors, was also void as to the administratrix of the mortgagor, is erroneous, as it was only void as to the latter in case the estate in her hands was insufficient to pay the debts.

Bagley v. Harmon, 91 Mo.App. 22.

Mo.App. 1903. Where a chattel mortgage was void as against the creditors of the mortgagor because it was not recorded in the proper county, and the mortgagor died insolvent and in possession of the mortgaged property, his administrator, being a trustee for his creditors, had the right to impeach or avoid the mortgage.

Hemley v. Harmon, 77 S.W. 136, 103 Mo. App. 233.

Mo.App. 1904. Property fraudulently conveyed by decedent formed no part of his estate and the county court had no control over it but creditors could maintain their suit in the district court except so far as they claimed to have property descended to the heirs subjected to their demand.

Hayes v. Fry, 83 S.W. 772, 110 Mo.App. 20.

⇐58. —— Property accruing after death.

Mo. 1852. Causes of action accruing after the death of the testator or intestate, but before administration is granted, accrue to the executor or administrator.

Wooldridge v. Draper, 15 Mo. 470.

⇐59. —— Evidence of ownership.

Mo. 1940. In wife's action against deceased husband's administrator to establish her interest in secured notes, evidence was

sufficient to trace proceeds from real estate held by the entirety to secured notes, so as to give wife an interest in the notes by the entirety.

Schwind v. O'Halloran, 142 S.W.2d 55, 346 Mo. 486.

Mo. 1944. That plaintiff did not until after father's death claim money in envelope bearing plaintiff's name found in father's safe deposit box, though it might be a strong circumstance against plaintiff, did not change the law on the burden of proof.

Ross v. Pendergast, 182 S.W.2d 307, 353 Mo. 300.

Plaintiff, claiming that money in envelope bearing his name found in father's safe deposit box after father's death belonged to plaintiff and that father was only keeping it for him, had the burden to establish such fact by a preponderance or greater weight of the evidence.

Ross v. Pendergast, 182 S.W.2d 307, 353 Mo. 300.

Mo. 1952. In replevin action involving issue as to existence of bailment as to personal property allegedly owned by plaintiff's intestate and kept, as a matter of convenience, in a safety deposit box maintained by defendants' decedent, record supported judgment for plaintiff.

Valentine v. St. Louis Union Trust Co., 250 S.W.2d 167.

Mo.App. 1904. Evidence in an action by an executrix on a note *held* insufficient to show that decedent was the owner of the note, found among his effects.

Hair v. Edwards, 77 S.W. 1089, 104 Mo. App. 213.

Mo.App. 1907. Evidence, in an action against an executor for money which was in the possession of deceased, *held* sufficient to show that it belonged to plaintiff.

Stuyvaert v. Arnold, 99 S.W. 529, 122 Mo. App. 421.

Mo.App. 1939. In executrix' action on note which was not an asset of deceased during his lifetime but was found among papers of his estate upon death of administrator pendente lite, who was also cashier of bank to which note was payable, and who had indorsed the note in blank as cashier, burden was on estate to adduce evidence from which it could be reasonably inferred that the estate was in possession with title.

Wolf v. Wuelling, 130 S.W.2d 671, 238 Mo.App. 1144.

Mo.App. 1942. In suit in equity against executor of estate of plaintiff's deceased sister to determine ownership of a bond, which the sister had purchased before her death, refusal to hold that the sister was absolute owner of bond at time of death and holding that she held the bond in trust for plaintiff and that plaintiff was entitled to possession thereof was proper under the evidence.

Idle v. Union Nat. Bank of Springfield, 156 S.W.2d 941, opinion quashed State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1085, 350 Mo. 622.

Mo.App. 1951. In action by the administrator of the estate of a wife against the administratrix of the estate of husband to require the turn over of a certain sum alleged to belong to the estate of wife, evidence sustained finding of trial court that husband and wife were the owners as tenants by the entirety of the homestead and were the joint owners of certain personal property and that husband and wife came to their death simultaneously. V.A.M.S. §§ 471.010 et seq., 471.030.

Adams v. Gardener, 237 S.W.2d 495.

Mo.App. 1953. In statutory proceeding to discover assets of deceased, where executors, while proving possession in deceased of property taken from premises occupied by deceased, put on witnesses whose testimony disclosed how deceased had obtained possession, and if she had done so wrongfully presumption of deceased's ownership disappeared and only facts giving rise to the presumption and other evidence were left for consideration. V.A.M.S. §§ 462.400, 462.410.

Dusenbery's Estate v. Stamm, 255 S.W. 2d 57.

In statutory proceeding by grandnephew of deceased against beneficiaries under will of deceased's predeceased sister, who had lived with deceased, for discovery of assets allegedly belonging to deceased, evidence established that deceased had appropriated the property involved from predeceased sister shortly after predeceased sister had died. V.A.M.S. §§ 462.400, 462.410.

Dusenbery's Estate v. Stamm, 255 S.W. 2d 57.

Mo.App. 1953. Exclusive possession and control of money and bonds found in envelopes in decedent's safe deposit box raised a presumption of ownership in decedent, notwithstanding declarations on envelopes in decedent's handwriting to the effect that contents were the property of another named person, and such person had the burden of proving her claim by a preponderance or greater weight of the evidence.

Gregg v. State, 257 S.W.2d 161.

For later cases see same Topic and Key Number in Pocket Parts

In proceeding by administrator to determine ownership of government bonds and currency, totaling $4,400, found in envelopes in decedent's safe deposit box, declarations written on envelopes by decedent to the effect that contents were the property of named school teacher who lived in decedent's home were admissible as evidence and were sufficient to make an issue of fact as to ownership of contents of envelopes, but did not compel a finding for school teacher, in view of evidence as to her income, size of and withdrawals from her bank account, and property and income of decedent.

Gregg v. State, 257 S.W.2d 161.

⇐60. Foreign assets.

Mo. 1847. If the tribunals within the jurisdiction of an ancillary administration can distribute or remit the assets found there, the courts having primary jurisdiction of administration cannot interfere with the assets within the limits of the ancillary administration.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

Mo. 1873. No exception arises as to the rule that an administrator has no authority to sell or transfer assets, except such as have their situs within the territory of the government granting the letters, in cases where the assets in question were held by the decedent as a surviving partner.

In re Ames' Estate, 52 Mo. 290.

Mo. 1897. An administrator's power as such does not extend beyond the boundaries of the state in which his letters of administration are granted, nor can he sue in the courts of any state, nor take possession of property belonging to his intestate without becoming a trespasser, unless he first qualifies as administrator according to the laws of the state where suit is intended to be brought or the property is situated.

Emmons v. Gordon, 41 S.W. 998, 140 Mo. 490, 62 Ann.St.Rep. 734.

Mo.App. 1916. An administrator taking charge of the personal property in another state and bringing it or its proceeds into this state, properly charged himself with it as a part of the personal estate to be administered according to the laws of this state.

Wyatt v. Wilhite, 183 S.W. 1107, 192 Mo. App. 551.

Administrator in collecting rents, paying taxes, etc., as to land in another state, acted in his personal capacity as agent and became trustee of the heirs.

Wyatt v. Wilhite, 183 S.W. 1107, 192 Mo. App. 551.

Mo.App. 1918. An order of relinquishment of the interest of intestate in land situated in another state is void, the administratrix having no power to inventory or administer such land in a state in which it was not situated.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

⇐61-64.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐62. Appraisal and inventory.

⇐65. —— Proceedings to compel.

Mo. 1835. An order of the county court to compel an executor to inventory property claimed by him as his own is not an order or decree from which an appeal will lie.

Davis v. Davis, 4 Mo. 204.

Mo. 1881. At any time before a final settlement the probate court has jurisdiction to compel an administrator to inventory any property of the estate which has been overlooked or omitted.

Walter v. Ford, 74 Mo. 195, 41 Am.Rep. 312.

Mo. 1948. Probate court order listing decedent's heirs and their respective shares in estate and finding that no inheritance tax was due the state and that therefore no appraiser should be appointed was not res judicata on issue of whether decedent's realty had escheated to the state, since order was entered by authority of statute establishing procedure for assessment and collection of inheritance tax and not in a judicial proceeding to which the state was a party or in a contested proceeding before an administrative tribunal acting judicially. Mo. R.S.A. §§ 571 et seq., 585, 620 et seq., V.A.M.S. §§ 145.020 et seq., 145.150, 470.010 et seq.

State ex rel. Kell v. Buchanan, 210 S.W.2d 359, 357 Mo. 750.

Mo.App. 1908. Rev.St.1899, §§ 74–76, Ann.St.1906, pp. 362, 363, V.A.M.S. §§ 462.400–462.420, provides for proceedings, by an executor or administrator on affidavit and interrogatories, to reach assets of a decedent's estate which have been concealed or embezzled. Section 77, § 462.430, provides that issues on the interrogatories and answer shall be tried by jury. Section 78 (page 364) § 462.440, allows similar proceedings against an executor or administrator who wrongfully withholds assets from inventory. *Held* to authorize the probate court and the circuit court, on appeal in such proceedings against an administrator, to try the title to the property alleged to

have been withheld, and, if he is found guilty, to compel him to make the inventory.

In re Huffman's Estate, 111 S.W. 848, 132 Mo.App. 44.

Under Rev.St.1899, § 78, Ann.St.1906, p. 364, V.A.M.S. § 462.440, applying, as against executors and administrators, the provisions of sections 74–77 pages 362, 363) §§ 462.400–462–430, for proceedings by executors and administrators against any person who has concealed, embezzled, or otherwise wrongfully withheld property of a decedent's estate, proceedings may be maintained, by affidavit and interrogatories, against an administrator for assets wrongfully withheld from inventory, as well as for assets concealed or embezzled by him.

In re Huffman's Estate, 111 S.W. 848, 132 Mo.App. 44.

Where the affidavit, in proceedings under Rev.St.1899, §§ 74–78, Ann.St.1906, pp. 362–364, V.A.M.S. §§ 462.400–462.440, against an administrator for wrongfully withholding assets of the estate from inventory, charges him with having the assets in his possession, or with having sold them and detained the proceeds, money as proceeds from sale of property may be reached, as well as the property unsold.

In re Huffman's Estate, 111 S.W. 848, 132 Mo.App. 44.

Mo.App. 1914. In a proceeding to compel an administrator to inventory certain bank stock under Rev.St.1909, § 74, V.A.M.S. § 462.-440, a judgment pursuant to a verdict awarding one half of the stock to complainant, and the other half to the administrator, instead of directing the inventory and distribution in due course of administration, *held* erroneous.

Gray v. Doubikin, 166 S.W. 1070, 179 Mo. App. 240.

Mo.App. 1941. A surviving husband's proceeding, wherein husband filed petition in probate court for an order declaring personalty held by deceased wife to be a trust for husband's benefit, could not be deemed a proceeding under the article of Administration Law respecting inventories, appraisements, and notice of letters. Rev.St.1939, § 57 et seq., Mo.St.Ann. § 57 et seq., p. 35 et seq.; Rev.St.1939, § 63 et seq., Mo.St.Ann. § 63 et seq., p. 38, V.A.M.S. §§ 462.010 et seq., 462.400 et seq.

In re Main's Estate, 152 S.W.2d 696, transferred 146 S.W.2d 597.

Mo.App. 1952. Where surviving husband appropriated household furnishings which had belonged to his deceased wife without having them set apart to him as his property by probate court, upon his death such property came into the possession of his executor as such and hence in proceeding against executor for discovery of assets belonging to predeceased wife's estate, a judgment could not be rendered against defendant as administrator de bonis non of wife's estate requiring him to inventory such property as assets of her estate. V.A.M.S. §§ 462.010, 462.020, 462.400, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐66. —— Property to be included.

Mo. 1887. The law makes it the duty of the executor to inventory all the real as well as the personal property, and under the order of the probate court he may lease the real estate, collect the rents, prosecute actions for the recovery of possession, discharge mortgages and other liens, and deliver the property to those entitled thereto when not needed for the payment of debts. Rev.St. §§ 70, 129, 130, 143.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1911. Even if under a will one was seized of a determinable fee in land, whereof his widow is entitled to dower, yet, such fee having determined on his death, the property does not belong to his estate, and therefore should not be included in his administratrix's inventory.

Dameron v. Lanyon, 138 S.W. 1, 234 Mo. 627.

Mo.App. 1929. Administrator must include in inventory all of decedent's property.

In re Van Fossen, 13 S.W.2d 1076.

Mo.App. 1942. The amount of indebtedness from which deceased's bankrupt son was relieved of liability by bankruptcy discharge was rightfully eliminated from inventory of deceased's estate.

Leach v. Armstrong, 156 S.W.2d 959, 236 Mo.App. 88, transferred 149 S.W. 2d 865.

Mo.App. 1952. While executor or administrator does not take physical possession of those articles of personal property which surviving spouse is entitled under statute to take as his or her absolute property, such property must be included in inventory and appraisement of the entire personal estate prepared by personal representative in order that its value in relation to statutory allowance to surviving spouse may be determined by court. V.A.M.S. §§ 462.010, 462.020, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐67-68.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

For later cases see same Topic and Key Number in Pocket Parts

⇐69. —— Defects and objections.

Mo.App. 1910. If notes belonged to an estate, their proceeds did not cease to be assets because they were not inventoried or accounted for in the administrator's final settlement, or because the probate court charged him with a note for which they were substituted.

Ewing v. Parrish, 128 S.W. 538, 148 Mo. App. 492.

⇐70. —— Amendment and correction.

For cases from other jurisdictions, see other Key Number Digests.

⇐71. —— Additional or supplemental inventory.

Mo.App. 1920. Where administrator erroneously appropriated as partnership property the proceeds of an insurance policy, the proper procedure was for the court to order the administrator to inventory it as an asset of the individual estate, in view of Rev.St. 1909, § 67, V.A.M.S. § 462.040, providing for an additional inventory.

Chapin's Estate v. Long, 224 S.W. 1012, 205 Mo.App. 414.

⇐72. —— Operation and effect.

Mo. 1881. An item in the inventory charging the administrator with a debt due from himself is not conclusive on him as to the existence of the debt, but is open to explanation.

Camp's Creditors v. Camp's Adm'r, 74 Mo. 192, affirming In re Camp's Estate 6 Mo.App. 563.

Mo. 1896. An appraisement of corporate stock in the hand of an administrator by three householders appointed by such administrator is not, as between him and the distributees, the prima facie value of the stock at the time of the appraisal.

Moffit v. Hereford, 34 S.W. 252, 132 Mo. 513.

Mo.App. 1882. Liability of executrix as stockholder to creditors of corporation whose stock she has inventoried and appropriated as residuary legatee. See,

Roeder v. Knoebel, 12 Mo.App. 587, memorandum.

Mo.App. 1888. While the administrator represents the deceased, he is also a trustee for the creditors of the estate, and in an action against him to enforce a lien he may be considered as representing the general creditors.

Hughes v. Menefee, 29 Mo.App. 192.

Mo.App. 1943. Where payee endorsed note in blank and note was found among papers of payee's deceased husband, the fact that note was not listed in original inventory of husband's estate did not preclude husband's personal representative from recovering on note.

Lambert v. Gutman, 171 S.W.2d 735.

⇐73. —— Failure to make.

Mo. 1826. Damages may be assessed for a failure to make and return an inventory.

Scott v. Governor of Missouri, 1 Mo. 686.

Mo.App. 1900. Under the summary proceedings authorized by Rev.St.1889, §§ 74–78, V.A.M.S. §§ 462.400–462.440, an administrator who has concealed or embezzled, or is otherwise wrongfully withholding, any goods, chattels, etc., may be compelled to inventory such property. *Held*, that where an administrator fails to inventory a debt due from him to the estate, not from any wrongful motive, but in the bona fide belief that no such debt exists, it was not contemplated by the statute that such question should be determined in the summary manner provided for.

Wilson v. Ruthrauff, 82 Mo.App. 435.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) IN GENERAL.

⇐74. Representation of decedent.

For cases from other jurisdictions, see other Key Number Digests.

⇐75. Representation of creditors and distributees.

Mo. 1876. An executor or administrator, in respect to creditors and distributees, is to be treated as a trustee.

Merritt's Estate v. Merritt, 62 Mo. 150.

Mo. 1924. An administrator is not a general trustee, but becomes trustee only with respect to property or assets coming into his custody under color of office, and with reference to such property he is trustee for creditors and persons who will share in its distribution, or who have an interest in it otherwise.

State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321.

Mo. 1927. Strictly speaking, administrator is not agent of heirs of decedent.

Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.

Mo. 1933. Executor occupies position of trust toward those interested in estate.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversed 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

For references to other topics, see Descriptive-Word Index

Mo. 1943. The legal title to a decedent's personalty passes primarily to his executor or administrator, from whom the heirs or legatees receive it through administration, and the administrator or executor represents not only the heirs and legatees, but also the law and creditors. Mo.R.S.A. §§ 2, 57, 94, 98, 180, 230, 249, 306, V.A.M.S. §§ 461.120, 462.010, 462.140, 461.640, 463.430, 465.170, 468.010, 537.010.

Odom v. Langston, 173 S.W.2d 826, 351 Mo. 609, transferred 170 S.W.2d 589, 237 Mo.App. 721, transferred 159 S.W. 2d 686.

Mo. 1949. The fiduciary relationship of executor and legatee connotes trust and confidence; contemplates good faith in all transactions, rather than mere naked legal obligation; comprehends integrity, loyalty, fidelity and trustworthiness more than it relates to credit or ability; and comprehends safe-keeping and separate holding of all monies received which fiduciary is in law and good conscience bound to pay over to those for whom he is acting.

In re Buder, 217 S.W.2d 563, 358 Mo. 796.

The fiduciary relationship of executor and legatee need not be based upon some technical relation created or defined in law, but exists where a special confidence has been reposed in one who in equity and good conscience is bound to act, not only in good faith, but also with utmost fidelity to interests of those reposing such special confidence.

In re Buder, 217 S.W.2d 563, 358 Mo. 796.

Mo.App. 1913. As a rule, an executor or administrator represents decedent generally, and in an action, as such, recovers to the use of the estate, so as to make the recovery available to all persons having just claims against the estate.

Gibbs v. Knights of Pythias of Missouri, 156 S.W. 11, 173 Mo.App. 34.

Mo.App. 1926. Administrator is primarily representative of estate, in prosecution of claims against it.

Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Mo.App. 1929. Executor or administrator must protect interests of all parties interested in estate.

Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

Mo.App. 1936. Executor of an estate is a trustee for the distributees, in whom is vested the equitable title.

Nord v. Nord, 91 S.W.2d 223.

Mo.App. 1949. The legal title to decedent's personal property descends to administrator or executor of decedent's estate, and such property is held in trust for benefit of creditors and those entitled to inherit or take it as heirs of estate.

Rone's Estate v. Rone, 218 S.W.2d 138.

Mo.App. 1949. Though legal title to personalty of deceased descends to the administrator, administrator is merely a trustee for the benefit of creditors, legatees, heirs and distributees and the equitable title is in them.

Williams v. Patterson, 218 S.W.2d 156, 240 Mo.App. 131.

Mo.App. 1950. An administrator of an estate of a deceased person represents estate as against creditors where there is contest between them, and it is administrator's duty to preserve estate for all persons interested in it, but he does not represent the creditors as against the estate.

Runnion v. Paquet, 233 S.W.2d 803.

An administratrix of an estate could not maintain an action to enjoin the beneficiary under decedent's life policies from collecting thereon on ground that beneficiary secured execution of policies on fraud, since administratrix merely represented the estate as against the creditors and did not represent the creditors as against the estate.

Runnion v. Paquet, 233 S.W.2d 803.

Mo.App. 1952. Administratrix holds property of decedent as trustee for benefit of creditors, legatees, heirs and distributees and equitable title to such property is in them.

Rhodes v. Rhodes' Estate, 246 S.W.2d 98.

⇐76. Jurisdiction of courts.

Mo. 1843. The general control over executors and administrators given to the circuit courts by Act March 7, 1835, art. 8, cl. 6, concerning courts, is limited in its application to such cases as are not specifically provided for in other parts of the same act and in the administration act.

Miller v. Woodward, 8 Mo. 169.

Mo. 1852. Under sections 9–11 of the act concerning administrators, Rev.Code, p. 74, an action cannot be maintained in the county court against an administrator for concealing or embezzling the effects of the deceased.

Powers v. Blakey's Adm'rs, 16 Mo. 437.

Although section 13 of the act "establishing courts", Rev.Code, p. 331, gives the county court exclusive original jurisdiction

of controversies respecting the duties of administrators, executors, or guardians, yet the mode of exercising that jurisdiction is not left to their discretion, but must accord with the provisions of law.

Powers v. Blakey's Adm'rs, 16 Mo. 437.

Mo. 1882. Land conveyed by a debtor in fraud of creditors is not assets of his estate after his death, and hence the probate court has no jurisdiction of an action to set aside such a conveyance.

Zoll v. Soper, 75 Mo. 460.

Mo. 1882. While the public administrator is independent of the probate court, he is not, with respect to proceedings in that court, in the administration of estates, and the court has jurisdiction to determine all questions in the progress of the administration, as well as its own jurisdiction over the estate.

McCabe v. Lewis, 76 Mo. 296.

Mo.App. 1879. Power of probate court to revise the action of the public administrator in taking charge of an estate. See,

Bushel v. Lewis, 6 Mo.App. 599, memorandum.

Mo.App. 1882. Jurisdiction of probate court to administer estate after dissolution. See,

Farmers' & Traders' Sav. Institution v. Garesche, 12 Mo.App. 584, memorandum.

Mo.App. 1889. While a probate court is not invested with independent equity jurisdiction, it is the proper forum to settle all matters which pertain strictly to the administration of the decedent's estate, and in doing so may exercise powers of an equitable nature.

Meeker v. Straat, 38 Mo.App. 239.

Mo.App. 1894. Under Rev.St.1889, § 183, V.A.M.S. § 464.010, giving probate courts jurisdiction of claims for funeral expenses and taxes against the estate, and section 222, § 465.100, of costs and expenses of administration, including attorney's fees, the probate court has jurisdiction of an estate, though no debts were proved against it.

Lycan v. Miller, 56 Mo.App. 79.

Mo.App. 1903. Where an administrator collected the rents of decedent's lands, and reported them to the probate court, and was charged therewith as administrator, notwithstanding the court had not ordered him to rent the land, it had jurisdiction to make an order on him to pay such rents to the widow of the deceased.

Lyons v. Lyons, 74 S.W. 467, 101 Mo.App. 494.

Mo.App. 1936. It is probate court's duty to see that executors and all other appointees in charge of decedents' estates do their duty; such court having superintending control over acts of all persons handling estates therein. V.A.M.S.Const. art. 6, § 34.

State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

⇐77. Powers before issue of letters or qualification.

Mo. 1873. The title under a will giving the executor a power of sale vests on the testator's death, and a conveyance made before probate of the will is good, if the will be afterwards probated.

Wilson v. Wilson, 54 Mo. 213.

Mo. 1900. A mere conversation between plaintiff and defendant after the death of the latter's husband, and before she had been appointed administratrix of his estate, in which she promised to pay plaintiff "every dollar her husband owed him," did not constitute a presentation of a claim for allowance and a waiver of notice, since, until defendant was qualified, she had no authority to bind the estate.

Bambrick v. Bambrick, 58 S.W. 8, 157 Mo. 423.

Mo.App. 1932. Administrator's expenses for abstracts and briefs in litigation arising during administration of estate *held* properly allowable claims against estate without regard to time of granting of letters.

St. Louis Law Printing Co. v. Aufderheide, 45 S.W.2d 543, 226 Mo.App. 680.

⇐78. Powers pending contest of will.

C.C.A.Mo. 1908. Executor was bound to carry out intention of testator and to defend will as written, and not to advise or assist heirs in the institution or prosecution of will contest.

Sternberg v. St. Louis Union Trust Co., 163 F.2d 714, certiorari denied 68 S. Ct. 267, 332 U.S. 843, 92 L.Ed. 414.

D.C.Mo. 1946. Under Illinois law, it is the duty of an executor to defend a will contest.

Sternberg v. St. Louis Union Trust Co., 66 F.Supp. 23.

Mo. 1900. Rev.St.1889, § 13, V.A.M.S. §§ 461.080, 461.090, provides that, if a will is contested, letters of administration shall be granted during the term of such contest. An appeal was taken from a judgment of the circuit court upholding decedent's will, but no appeal bond was given. *Held*, that the executor under the will was not entitled to possession of the estate, as against the administrator pendente lite, on the ground that the

appeal did not suspend the judgment of the circuit court.

Carroll v. Reid, 59 S.W. 69, 158 Mo. 319.

Mo. 1928. Probate court, having assumed jurisdiction over decedent's estate by ordering executor to rent realty, subsequent will contest did not oust it of jurisdiction. V.A.M.S.Const. art. 6, § 34; Rev.St.1919, §§ 13, 129, V.A.M.S. §§ 461.080, 461.090, 462.280.

Seibert v. Harden, 8 S.W.2d 905, 319 Mo. 1105.

Institution of will contest revoked executor's right to control realty. V.A.M.S. Const. art. 6, § 34; Rev.St.1919, §§ 13, 129, V.A.M.S. §§ 461.080, 461.090, 462.280.

Seibert v. Harden, 8 S.W.2d 905, 319 Mo. 1105.

Mo. 1929. Filing of will contest merely suspended authority of executrix pending contest. Rev.St.1919, §§ 13, 40, V.A.M.S. §§ 461.080, 461.090, 461.220.

State ex rel. Barlow v. Holtcamp, 14 S.W. 2d 646, 322 Mo. 258.

Mo. 1946. A will contest suspends the authority of executor pending determination of contest, but such contest does not prevent five year statute of limitations from commencing to run upon probation of the will in common form and appointment of executors. Mo.R.S.A. § 1014, V.A.M.S. § 516.-120.

Odom v. Langston, 195 S.W.2d 463, 355 Mo. 109.

Mo.App. 1922. When suit to contest a will was filed in the circuit court, it operated ipso facto to vacate the order of the probate court admitting the will to probate, and the estate was in the same condition in the probate court that it would have been had no will been filed, and a compromise at such time between executors under the will and one indebted to the estate was void and of no force and effect, the executors having no authority to act at such time.

Wilkerson v. Hunt, 245 S.W. 615.

Mo.App. 1937. In will contest, authority of executor, if he has interest in estate, is suspended by statute pending will contest, and, in event contestants are successful, executor, if a party, at once becomes functus officio, and no one is left who has duty to look after interests of estate. Mo. St.Ann. § 14, p. 14, V.A.M.S. § 461.090.

McCrary v. Michael, 109 S.W.2d 50, 233 Mo.App. 797.

⇐79. Powers pending appeal from appointment.

For cases from other jurisdictions, see other Key Number Digests.

⇐80. Delegation of powers.

Mo.App. 1936. Ordinarily, trust confided to executor for purpose collateral to that of mere administration of estate is personal to such appointee and cannot be exercised by any other person.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

⇐81. Execution of provisions of will in general.

C.C.A.Mo. 1947. Executor was bound to carry out intention of testator and to defend will as written, and not to advise or assist heirs in the institution or prosecution of will contest.

Sternberg v. St. Louis Union Trust Co., 163 F.2d 714, certiorari denied 68 S. Ct. 267, 332 U.S. 843, 92 L.Ed. 414.

Mo. 1906. Testator's will gave all his property, real and personal, to his wife and one of his sons, and provided that, in case of the death of either of them, the property should go to the survivor in trust for themselves and another son and two daughters, and it was recited that the wife and first-mentioned son should have full power and authority to make distribution of the property among testator's heirs as to them might appear best, and to distribute to those of testator's heirs who were the most in want in the same manner as testator could do, were he living. The widow and such son were made executors and authorized to sell on such terms as they might deem suitable for the payment of debts or distribution. The will was made during the Civil War, and testator's estate, though large, was undeveloped and testator considerably indebted. *Held*, that during the period of administration, as well as through the period of trusteeship, the executors and trustees possessed a discretion and right to devote any part of the estate or of the proceeds thereof to the wants or necessities of the beneficiaries or either of them, and the power to discriminate as to the condition of testator's children was not limited to the time of his death.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

Mo. 1933. Executor may be given both powers inhering in office and devolving on his successor and strictly personal duties as trustee, independent of his official position, by same will.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversed 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S. W.2d 367.

⇐82. Instructions of court.

Mo.App. 1898. After an administrator made a sale of land, it was discovered that

two minor children had a homestead right in the land, whereupon the administrator, the guardian of the minors, and the purchaser agreed on the value of such homestead right, and that the purchaser should pay this amount to the guardian for the wards in full satisfaction of their interest in the land, and that the administrator should receive the balance of the purchase price as the full amount due the estate. *Held*, that the probate court, in the exercise of exclusive jurisdiction in the management of estates, had authority to ratify the action of the administrator in the adjustment of the business, and its judgment of confirmation was not without jurisdiction.

Hesche's Estate v. Schnecko, 73 Mo.App. 612.

Mo.App. 1902. An order of the probate court authorizing an administrator to compromise a note was interlocutory in its nature, and open and subject to review and correction at the final settlement.

In re Hutton's Estate, 92 Mo.App. 132.

⇐83. Discovery and collection of assets.

⇐84. —— Authority and duty in general.

D.C.Mo. 1946. An executor or a trustee has the duty to collect and conserve an estate and to carry out a testator's intent.

Sternberg v. St. Louis Union Trust Co., 66 F.Supp. 23.

Mo. 1862. An administrator is the proper person to bring any civil action necessary to collect a debt due to the estate.

Young v. Wells, 33 Mo. 106.

Mo. 1880. Where a decedent leaves property in the hands of the sheriff under attachment, either his administrator or the attachment creditor may, under Rev.St. §§ 121–123, apply for an order that the property be turned over to the administrator to be separately inventoried and applied to the claims prior in rank to the attachment and to the attachment.

Kenrick v. Huff, 71 Mo. 570.

Mo. 1881. Where assets of the estate are lost by the fault or insolvency of an agent of the administrator, without any collusion, negligence, or inattention of the administrator, the latter is not liable for the loss.

Julian v. Abbott, 73 Mo. 580.

An administrator is bound to use all the care, caution, and diligence in the management, protection, and collection of assets that a careful business man would use in the management of his own business.

Julian v. Abbott, 73 Mo. 580.

Mo. 1882. A public administrator, who has improperly taken charge of an estate, cannot maintain an action on behalf of such estate.

Lewis v. McCabe, 76 Mo. 307.

Mo.App. 1924. An administrator is without power to receive payments of contested claims under an agreement to refund any amount which may be found not to be due.

Wilkins v. Bell's Estate, 261 S.W. 927.

Mo.App. 1931. Executor finding personal property in safe deposit vault of deceased has duty to take possession of it for estate, if there is any question that it belongs to another.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

Executor finding securities in deceased's safe deposit vault, and, in good faith, taking possession of them for estate, should be protected from personal liability.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

⇐85. —— Proceedings for discovery of assets.

⇐85(1). Nature and form of remedy.

D.C.Mo. 1950. An action based on a contract and brought by an executor seeking recovery of certificates representing shares of stock, or of shares of stock, and asking for delivery of specific personalty with right to possession was an action for recovery of a "chose in action."

Becker v. Buder, 88 F.Supp. 616, affirmed 185 F.2d 311.

Mo. 1909. A proceeding against administrators to recover alleged withheld assets authorized by Rev.St.1899, §§ 74, 75, 77, 78, Ann.St.1906, pp. 362–364, V.A.M.S. §§ 462.400, 462.410, 462.430, 462.440, is not limited to a mere discovery of assets, but describes a summary method of bringing property into the estate, and is therefore available for the trial of property rights in such case.

In re Clinton's Estate, 123 S.W. 1, 223 Mo. 371.

Mo. 1932. Administrator could not seek discovery of assets of estate in administrator's action to cancel intestate's deed; statutory procedure being necessary. Rev.St. 1929, §§ 63–67, V.A.M.S. §§ 462.400–462.440.

Kadlowski v. Schwan, 44 S.W.2d 639, 329 Mo. 446.

Mo. 1933. "Proceeding to discover assets" is summary method of bringing property into estate and was devised not merely to discover assets, but to expedite administration. Rev.St.1929, §§ 63–66, V.A.M.S. §§ 462.400–462.430.

Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred 47 S.W.2d 121.

"Proceeding to discover assets" is an action in which property rights may be determined, and cannot be maintained on purely equitable grounds. Rev.St.1929, §§ 63–66, V.A.M.S. §§ 462.400–462.430.

Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred 47 S.W.2d 121.

Mo. 1936. Where specific personal property of estate has been sold and proceeds deposited in bank account of seller, summary proceeding to discover assets is proper remedy to compel seller to pay amount of proceeds to estate, and remedy is not confined to actual money which belonged to decedent.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

The Declaratory Judgment Act did not repeal statutory provisions relating to discovery of assets in the probate court. Mo. St.Ann. §§ 63–67, pp. 38–43; § 1097a et seq., pp. 1387, 1388, V.A.M.S. §§ 462.400–462.440, 527.010.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Mo. 1952. The statutory procedure for discovery and recovery of assets of decedent's estate in probate court is summary and quick method of bringing property into estate and is devised, not merely to discover assets but also to expedite administration of estate by affording new and special remedy for collecting assets. V.A.M.S. §§ 462.400 to 462.440.

Zeitinger v. Mitchell, 244 S.W.2d 91.

The statute requiring probate court to compel person convicted of concealing or otherwise wrongfully withholding property of decedent to deliver property to administrator by attachment of his person for contempt and committing him to jail until he complies with court's order is not unconstitutional as authorizing imprisonment for debt. V.A.M.S. § 462.430; V.A.M.S.Const. art. 1, § 11.

Zeitinger v. Mitchell, 244 S.W.2d 91.

Mo.App. 1893. Rev.St. § 74, V.A.M.S. § 462.400, provides that if the executor or administrator, or other person interested in the estate, file an affidavit that property has been concealed by any person, the court may cite such person to appear before it. Section 75, § 462.410, provides for an examination of such person under oath, "after which, at the instance of the administrator or executor, other witnesses may be examined," but first interrogatories shall be filed. *Held*, that all proceedings after the preliminary examination must be had at the instance of the administrator or executor.

Brotherton v. Spence, 52 Mo.App. 664.

Mo.App. 1943. Appointment of an inheritance tax appraiser does not supplant ordinary proceedings for discovery of assets nor does the appraiser, by his appointment, become a representative of the state so as to have an interest adverse to that of the heirs and transferees. Mo.R.S.A. §§ 571–604, V.A.M.S. § 145.020 et seq.

Trieseler v. Ratican, 173 S.W.2d 505, 237 Mo.App. 490.

⇐85(1½). Scope of inquiry and questions considered.

Mo. 1927. Title to disputed property may be tried in discovery proceeding and delivery of property to administrator compelled if wrongfully possessed. Rev.St.1919, §§ 56–79, V.A.M.S. § 462.010 et seq.

Morley v. Prendiville, 295 S.W. 563, 316 Mo. 1094.

Mo. 1939. A proceeding in probate court to discover assets is an action at law in which property rights may be tried and determined. Mo.St.Ann. §§ 63, 64, pp. 38, 41, V.A.M.S. §§ 462.400, 462.410.

State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580.

⇐85(2). Persons by or against whom proceedings may be brought.

Mo. 1903. Under Rev.St.1899, § 2938, V.A.M.S. § 469.130, entitling a husband, where there are no children, to one-half of the wife's estate absolutely, the husband is a person interested in the estate, within section 74, § 462.400, authorizing a "person interested" to file an affidavit preliminary to proceedings for the discovery of assets.

Ex parte Gfeller, 77 S.W. 552, 178 Mo. 248.

Mo.App. 1902. Where the probate court issues a citation, under Rev.St.1899, § 74, V.A.M.S. § 462.400, in a proceeding for the discovery of assets of an estate, it necessarily decides that the petitioner is a person interested in the estate, authorized to bring such proceeding.

Eckerle v. Wood, 69 S.W. 45, 95 Mo.App. 378.

Mo.App. 1919. A proceeding under Rev. St.1909, §§ 70–74, V.A.M.S. §§ 462.400–462.440, to discover assets of the estate of a deceased person, may be had as well against an administrator as against any other person.

State ex rel. Lamm v. Lamm, 216 S.W. 332.

⇐85(3). Property as to which discovery may be obtained.

Mo. 1854. Rev.Code 1845 (Act Concerning Executors and Administrators) art. 2, § 7,

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providing that any person embezzling or concealing assets of a decedent may be summarily brought before the probate or county court, and compelled to surrender the same, is inapplicable where such person has no control over or possession of the property so embezzled and concealed at the time the complaint is made against him.

Dameron's Adm'r v. Dameron, 19 Mo. 317.

Mo. 1865. Rev.Code 1855, p. 130, § 7, providing for the recovery of goods of a deceased person which have been embezzled, applies only in case the person charged with the embezzlement has them in actual possession at the time of the commencement of proceedings.

Howell v. Howell, 37 Mo. 124.

Mo. 1871. Testator by will gave all his property to his wife, to manage and control for her benefit and that of her children, with power of sale, and at her death to be divided among his children. On her death the administrator of the testator took possession of her personal property, embracing the household furniture, notes, and accounts, claiming that they belonged to that estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property and proceeded against testator's administrator by attachment. It appeared that after the death of the husband the wife continued the business and died in possession of an estate, treating it as her own. *Held* that, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.

Hook v. Dyer, 47 Mo. 214.

Mo. 1874. Under Wag.St. p. 85, §§ 7, 8, 10, 11, authorizing proceedings against an administrator to recover personal property of the deceased which has been embezzled, it is essential to a recovery that the property charged to have been embezzled be in his possession at the commencement of the proceeding.

Stewart v. Glenn, 58 Mo. 481.

Mo. 1883. In proceedings under Wag. St. p. 85, §§ 7–11, authorizing an administrator to take proceedings to recover assets belonging to the estate held by a third person, instituted against the widow of the decedent, who claims the property under a color of title, the widow will be entitled to keep her absolute property, as provided by page 88, §§ 33, 35, 36, and she cannot be compelled to surrender the same in such a proceeding.

Eans' Adm'r v. Eans, 79 Mo. 53.

Under Wag.St. p. 85, §§ 7–11, authorizing an administrator to file an affidavit stating that he has good cause to believe that a person has concealed or embezzled property belonging to his intestate, and has it in his possession or under his control, and declaring that, if any person cited to appear in response to such an affidavit shall refuse to answer proper interrogatories, the court may commit him to jail until he answers or is discharged by law, and declaring that, if the person cited shall deny the truth of the allegations in the affidavit, the issue shall be tried by a jury or by the court in a summary manner, and authorizing the court to compel the delivery of the property found to belong to the estate of the intestate, an administrator may maintain a proceeding to recover property belonging to his estate, not only where such property has been concealed or embezzled, but also where such property is claimed under a color of title.

Eans' Adm'r v. Eans, 79 Mo. 53.

Mo. 1936. Trustee was required to immediately turn over to administrator of estate the money which trustee received on foreclosure of deeds of trust on realty belonging to estate.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Administrator's right to judgment in statutory proceeding by administrator to discover assets which administrator claimed trustee had not paid to estate after foreclosing deeds of trust on realty belonging to estate was not based on what administrator was personally entitled to as his own, but on what belonged to estate.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Amount paid for administrator personally by trustee who foreclosed deeds of trust on realty belonging to estate was at trustee's own risk and was not for estate, and must be considered as paid out of trustee's personal funds and not out of proceeds of sale.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Trustee who foreclosed trust deeds on realty belonging to estate could not withhold from proceeds of foreclosure sale turned over to administrator the amount of trustee's allowed claim against estate.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Mo. 1952. "Money" is a generic term and does not mean currency or specie alone, but also wealth, capital and property, may be currency, not earmarked, and passing from hand to hand, and is "personal property" within statutes authorizing collection

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and recovery of such property of decedent's estate in citation proceedings against person believed to be concealing or otherwise wrongfully withholding it. V.A.M.S. §§ 462.400 to 462.440.

Zeitinger v. Mitchell, 244 S.W.2d 91.

The word "money" in statute authorizing probate court to cite person believed by administrator of, or other person interested in, decedent's estate to be concealing or otherwise wrongfully withholding goods, money, etc., of decedent, to appear before court and to compel his appearance by attachment, does not mean only specific currency, specie, check, or other written instrument payable in money on demand, which such person actually received. V.A.M.S. § 462.400.

Zeitinger v. Mitchell, 244 S.W.2d 91.

Statutory proceedings to discover and recover assets of decedent's estate lie against person concealing, embezzling, or otherwise wrongfully withholding any money of decedent, though such money or proceeds of collection for estate or sale of decedent's property were commingled with his other monies in general bank account or otherwise converted by him. V.A.M.S. §§ 462.400 to 462.440.

Zeitinger v. Mitchell, 244 S.W.2d 91.

The word "property" in statute requiring probate court to compel delivery of decedent's property to administrator of his estate by attachment of person of one wrongfully withholding property for contempt and to commit him to jail until he complies with order to deliver property, includes "money" within section authorizing court to cite person wrongfully withholding decedent's goods, money, etc., to appear before court and to compel such appearance by attachment, and court has jurisdiction to issue commitment after required adjudications. V.A.M.S. §§ 462.400, 462.430.

Zeitinger v. Mitchell, 244 S.W.2d 91.

Mo.App. 1920. Under Rev.St.1909, § 70, V.A.M.S. § 462.400, and in view of section 73, § 462.430 the specific property alleged by the public administrator to have been detained, concealed, or held out need not be identified to enable him to recover it.

Newell v. Kern, 218 S.W. 443.

⊂⇒85 (4). Jurisdiction.

Mo. 1919. The probate court had jurisdiction of an action under Rev.St.1909, §§ 70–73, V.A.M.S. §§ 462.400–462.430, where defendant was charged with unlawfully withholding personal property belonging to the estate of his wife, the property being in his possession.

Vazis v. Zimmer, 209 S.W. 909.

Mo. 1939. In proceeding to discover assets, probate court was without jurisdiction to determine whether testatrix gave a bond to alleged trustee in trust for third person, but could determine issue whether testatrix gave certain other bonds and note to alleged trustee as a gift. Mo.St.Ann. §§ 63, 64, pp. 38, 41, V.A.M.S. §§ 462.400, 462.410.

State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909, 343 Mo. 580.

Mo.App. 1902. A grant of power to a probate court to proceed for the discovery of assets of an estate grants all incidental authority necessary to make the principal grant effective.

Eckerle v. Wood, 69 S.W. 45, 95 Mo.App. 378.

Mo.App. 1914. The probate court has exclusive original jurisdiction to determine the validity of a transfer of funds by a husband since deceased to his wife, alleged to be in fraud of creditors, whether the widow claimed by gift or in payment of services either in whole or in part.

Lemp Brewing Co. v. Steckman, 168 S. W. 226, 180 Mo.App. 320.

Mo.App. 1924. If a proceeding between a judgment creditor of deceased and makers of notes executed to deceased is to be regarded in effect as a proceeding to discover assets of deceased's estate, pursuant to Rev. St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq., jurisdiction was exclusively in the probate court.

State Bank of Willow Springs v. Lillibridge, 262 S.W. 433, affirmed in part and reversed in part 293 S.W. 116.

Mo.App. 1934. Where sole controversy in administrator's proceeding to discover assets was whether deceased's assignment was in fraud of creditors, court *held* without jurisdiction, since proceeding to attack conveyance as fraudulent can be brought only by creditors. Mo.St.Ann. § 63, p. 38, V.A. M.S. § 462.400.

In re Knott's Estate, 65 S.W.2d 1069.

Mo.App. 1941. Under proceedings to discover assets, the probate court has no equitable jurisdiction.

In re Main's Estate, 152 S.W.2d 696, 236 Mo.App. 88, transferred 146 S.W.2d 597.

Mo.App. 1945. Probate court had jurisdiction to determine whether rents collected from deceased's realty belonged to residuary devisee or should have been accounted for as asset of deceased's estate, and fact that particular form of proceeding was not specifically authorized by statute did not preclude exercise of jurisdiction so

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long as the practice accorded with proper exercise of powers conferred on probate court.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

⇐85 (4½). Parties and process or notice.

D.C.Mo. 1952. Where federal tax lien against taxpayer's property was on file in county at time of appeal to Missouri Circuit Court in probate proceeding by an administrator to discover assets of estate of taxpayer's daughter, and stipulation for judgment in the circuit court proceedings stated that a purpose was to perfect title of persons purchasing property from taxpayer, the United States was a necessary party to the proceedings.

U. S. v. Dickerson, 101 F.Supp. 262.

Mo. 1949. Probate court of Wayne county had jurisdiction under statute to issue citation requiring named person to appear before court to answer interrogatories in regard to administrator's charge that he was wrongfully withholding money belonging to estate which was in process of administration in Wayne county and to cause such citation and attachment issued upon his disobedience of citation to be served on named person in another county, and his arrest under attachment in another county was lawful. Mo.R.S.A. §§ 63–66, 282, V.A.M.S. §§ 461.290, 462.400–462.430.

Zeitinger v. Drewes, 217 S.W.2d 549, 358 Mo. 909.

Mo.App. 1945. In administrator's proceeding in probate court of Wayne county to recover assets, wherein defendant served by sheriff of city of St. Louis did not appear, such probate court had jurisdiction to order Wayne county sheriff to seize defendant in St. Louis, and circuit court, on appeal, had jurisdiction to render judgment for assets withheld by defendant. Mo.R.S.A. §§ 63–66, 282, V.A.M.S. §§ 461.290, 462.400–462.430.

In re Jacob's Estate, 188 S.W.2d 956, 238 Mo.App. 833.

⇐85(5). Petition, affidavit, and interrogatories.

Mo. 1901. Rev.St.1899, § 74, V.A.M.S. § 462.400, provides that, if an executor or other person interested in an estate file an affidavit that he believes any person has concealed, or embezzled, or wrongfully withheld any assets of the deceased, the court may compel the appearance of such person. Section 75, § 462.410, declares that, if a party does not admit allegations of affidavit, interrogatories may be filed. An affidavit charged that an executor concealed and had in his possession assets of the estate, which he neglected and refused to inventory. Thereupon certain interrogatories were filed, and answers by the defendant. *Held* that, after the filing of the interrogatories and the answers thereto, it was immaterial that the affidavit only charged the concealing of assets, where the interrogatories and the answers did not refer to the concealing of assets, but only to the "withholding" of the same.

Tygard v. Falor, 63 S.W. 672, 163 Mo. 234.

Mo. 1927. Answers and interrogatories of defendant, when examined under oath in proceedings to discover assets of deceased, cannot take place of testimony. Rev.St. 1919, §§ 62–65, V.A.M.S. §§ 462.400–462.430.

Starks v. Lincoln, 291 S.W. 132, 316 Mo. 483.

Mo. 1928. In proceeding to recover assets of estate, interrogatories and answers constitute pleading. Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

In proceeding to recover assets of estate, interrogatories need not be numerically answered. Rev.St.1919, §§ 62–64, V.A.M.S. §§ 462.400–462.420.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

In proceeding to recover assets of estate, court properly overruled plaintiff's motion for judgment on pleadings consisting of interrogatories and answers which raised general issue. Rev.St.1919, § 62 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Mo. 1933. In proceeding to discover assets, issues are framed by interrogatories and answers, and trial is had on them. Rev.St.1929, §§ 63–66, V.A.M.S. §§ 462.400–462.430.

Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred 47 S.W.2d 121.

Mo. 1941. In administratrix' action to discover assets of decedent's estate, interrogatories to defendants and their answers thereto are the pleadings and settle issues involved.

In re Decker's Estate, 152 S.W.2d 104, 348 Mo. 32.

Mo. 1943. In a proceeding to discover assets, interrogatories and the answers thereto constitute the "pleadings" and settle the issues to be tried.

In re Estes Estate, 166 S.W.2d 1061.

Mo. 1951. In statutory proceeding to discover alleged assets of a decedent's estate, the issues are framed by the interroga-

tories and the answers thereto. V.A.M.S. §§ 462.400 to 462.440.

In re Lipic's Estate, 248 S.W.2d 100, 362 Mo. 623.

Mo.App. 1922. In a proceeding under Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq. to recover assets belonging to an estate, the interrogatories and answers thereto constitute the pleadings and make up the issues to be tried, and such interrogatories and answers are not to be considered as evidence except in so far as they contain admissions against the interests of the parties.

Newell v. Edom, 242 S.W. 701.

Mo.App. 1926. Executor's petition for recovery of money from fiduciary agent of deceased stated cause of action in equity for accounting.

Allen v. Van Horn, 10 S.W.2d 969, 222 Mo.App. 930.

Mo.App. 1942. In proceeding for discovery of assets alleged to belong to estate of a decedent, the interrogatories and answers thereto constitute the pleadings and definitely settle the issues involved. Rev.St. 1939, §§ 64, 66, V.A.M.S. §§ 462.410, 462.430.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

In proceeding to discover assets alleged to belong to estate of a decedent, if no issues were properly raised, trial court properly sustained motion for judgment on the pleadings, but if issues were properly raised, they should have been tried by court or jury. Rev.St.1939, §§ 64, 66, V.A.M.S. §§ 462.410, 462.430.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

In proceedings to discover assets alleged to belong to estate of a decedent, the original affidavit and any answer filed thereto does not constitute the pleadings, and, hence, filing of original affidavit and filing of a general denial thereto would not raise an issue to be tried. Rev.St.1939, §§ 64, 66, V.A.M.S. §§ 462.410, 462.430.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

Mo.App. 1942. In proceeding for discovery of assets alleged to belong to estate of a decedent, the interrogatories and answers thereto constitute the pleadings and definitely settle the issues involved.

Wilson's Estate v. Wilson, 164 S.W.2d 73.

In proceeding for discovery of assets alleged to belong to estate of a decedent, defendant's answer to interrogatories which, in effect, denied that defendant was at any time in possession of any money belonging to estate was sufficient to raise an issue in probate court, and granting of judgment on the pleadings for plaintiff was improper.

Wilson's Estate v. Wilson, 164 S.W.2d 73.

Mo.App. 1953. In statutory proceeding to discover assets of deceased's estate, interrogatories and answers make up pleadings and issues to be tried must be found in them. V.A.M.S. §§ 462.400, 462.410.

Dusenbery's Estate v. Stamm, 255 S.W. 2d 57.

In statutory action to discover assets of deceased, interrogatories and answers which showed that defendants had taken property from premises occupied by deceased and which contained recitation of facts which, if true, disclosed such property taken belonged to another raised issue as to ownership of the property and precluded judgment on pleading. V.A.M.S. §§ 462.400, 462.410.

Dusenbery's Estate v. Stamm, 255 S.W. 2d 57.

⇐85(5¼). Evidence.

C.A.Mo. 1951. In action by decedent's executor for recovery of certificates representing shares of stock, or of shares of stock, sold decedent under written contract, evidence sustained finding that executor was entitled to have shares of stock when and if they became available for delivery.

Buder v. Becker, 185 F.2d 311.

Mo. 1917. Where deceased clearly recognized his son's partnership with him, acknowledged his indebtedness to the son, and undertook to pay it, the son's claim may be established without proving a strict partnership.

Denny v. Brown, 193 S.W. 552.

Where a son claims his deceased father left him valuable personal property in settlement of their partnership, he must produce clear and positive evidence which is convincing beyond a reasonable doubt.

Denny v. Brown, 193 S.W. 552.

Evidence that deceased induced his son to work a farm under an agreement to divide certain personal property with him as a partner, the father's statements that such arrangement existed and efforts to discharge his liability under the agreement sustains a jury verdict that such arrangement was made.

Denny v. Brown, 193 S.W. 552.

Mo. 1922. A finding by the trial court, from a consideration of a writing signed by decedent and extrinsic evidence, that there

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was a completed sale of personalty to decedent's son, *held* supported by substantial evidence, so that a judgment in favor of the son would not be disturbed on appeal.

Sexton v. Sexton, 243 S.W. 315, 295 Mo. 134, transferred from Court of Appeals, 1920, 224 S.W. 47.

Mo. 1928. In proceedings to recover assets of estate, defendant claiming title by gift had burden of proving essential elements of gift and of explaining why certificate of stock was inventoried by her as executrix. Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

In proceedings to recover assets of estate in which pleadings raised general issue of ownership, defendant, claiming gift, had burden of proving valid gift. Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Mo. 1936. Evidence that special tax bill was marked paid and was entered satisfied in comptroller's record prior to landowner's death would support finding that tax bill was paid during landowner's lifetime, as respects amount of money which came into trustee's hands on foreclosure of deeds of trust on such land.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

In statutory proceeding by administrator to discover assets which administrator claimed trustee had not paid to estate after foreclosing deeds of trust on realty belonging to estate, evidence *held* to show that there was as much due from trustee as amount of verdict of jury.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Mo. 1950. A decedent's surviving son, with whom decedent had joint bank account, was liable to decedent's estate for amount of funds transferred from decedent's individual account in another bank to joint account one month before decedent's death, in absence of evidence that transfer was not result of such son's undue influence over decedent, though son was unable to testify.

In re Kaimann's Estate, 229 S.W.2d 527, 360 Mo. 544.

A decedent's surviving son, with whom decedent had joint bank account, failed to sustain burden of proving son's right to balance of account as to five deposits of decedent's money therein by son, in absence of evidence that decedent knew of such deposits or impliedly gave any directions as to deposit thereof in joint account.

In re Kaimann's Estate, 229 S.W.2d 527, 360 Mo. 544.

Mo.App. 1915. In a proceeding to discover assets claimed to be withheld from an administrator, evidence *held* not to overcome a prima facie presumption that a draft, claimed to be withheld, was delivered to defendant in the lifetime of deceased.

Chandler v. Hedrick, 173 S.W. 93, 187 Mo.App. 664.

Mo.App. 1915. In a proceeding under Rev.St.1909, § 74, V.A.M.S. § 462.440, the burden is on an administrator who claims property as a gift from his intestate to prove such fact.

Gray v. Doubikin, 176 S.W. 514, 188 Mo.App. 667.

Mo.App. 1923. In a proceeding by an administrator of a mother's estate against a son, in which it was alleged that he concealed and withheld Liberty bond of the estate, evidence *held* sufficient for jury to find against him.

Roelofson v. Whitten, 249 S.W. 688.

In an action by an administrator alleging that defendant withheld assets of the estate, jury *held* not required to believe defendant's evidence that the municipal bonds admitted by him to have been in his possession and sold by him were a gift to him.

Roelofson v. Whitten, 249 S.W. 688.

Mo.App. 1924. In action to discover assets of estate brought under Rev.St.1919, §§ 62–65, V.A.M.S. §§ 462.400–462.430, where prima facie case is made against defendants claiming property alleged to belong to estate, burden is on them to establish their ownership by proof which is clear, full, unequivocal, and convincing to the judicial mind.

In re Martin's Estate, 266 S.W. 750, 219 Mo.App. 51.

Mo.App. 1928. Person claiming gift has burden of proof in proceeding to discover assets. Rev.St.1919, § 62, V.A.M.S. § 462.400.

Cremer v. May, 8 S.W.2d 110, 223 Mo. App. 57.

Mo.App. 1928. Evidence that deceased was placed under guardianship shortly after transaction by agent was admissible to show fiduciary relationship.

Allen v. Van Horn, 10 S.W.2d 960, 222 Mo.App. 930.

Mo.App. 1929. Widow must show that she has title to property in her possession and how property was acquired, in discovery

proceedings. Rev.St.1919, § 62, V.A.M.S. § 462.400.

In re Van Fossen, 13 S.W.2d 1076.

Mo.App. 1945. In administrator's proceeding to recover assets, evidence as to whether decedent, whose affairs were handled by defendant, authorized defendant to withhold certain money as compensation, or whether defendant handled decedent's affairs solely out of friendship, or received payment currently, supported verdict allowing recovery. Mo.R.S.A. §§ 63–66, V.A.M.S. §§ 462.400–462.430.

In re Jacobs' Estate, 188 S.W.2d 956, 238 Mo.App. 833.

⇐85(5½). Answer.

Mo. 1909. Where, in a proceeding against an administrator for discovery and an accounting of alleged concealed assets, defendant answered interrogatories submitted as required by Rev.St.1899, § 75, Ann.St. 1906, p. 363, V.A.M.S. § 462.410, complainants were entitled to reply to such answers to more clearly define and shorten the issues.

In re Clinton's Estate, 123 S.W. 1, 223 Mo. 371.

Mo. 1917. Although a son's answer to interrogatories in probate court proceedings claimed his father left him property in settlement of partnership liabilities, he is not bound to prove a strict partnership, since formal pleadings are unnecessary in cases originating in probate court.

Denny v. Brown, 193 S.W. 552.

Mo. 1943. In a proceeding to discover assets, interrogatories and the answers thereto constitute the "pleadings" and settle the issues to be tried.

In re Estes' Estate, 166 S.W.2d 1061.

Mo.App. 1942. In proceeding to discover assets alleged to belong to partnership estate, one of partners being deceased, answers of surviving partner to interrogatories sufficiently pleaded ultimate facts to raise question of whether heirs of deceased partner consented to surviving partner managing assets of partnership after death of partner, so as to be "estopped" from asserting their claim against surviving partner because of surviving partner's management of partnership assets. Rev.St.1939, §§ 64, 66, V.A.M.S. §§ 462.410, 462.430.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

⇐85(6). Hearing and examination.

Mo. 1927. Whether decedent intended gift of bonds to defendant *held* for jury.

Morley v. Prendiville, 295 S.W. 563, 316 Mo. 1094.

Mo. 1928. In proceeding to recover assets of estate, whether deceased made gift to defendant of property involved *held* for jury. Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Mo. 1936. In statutory proceeding by administrator to discover assets which administrator claimed trustee had not paid to estate after foreclosing deeds of trust on realty belonging to estate, evidence concerning amount of agreed sale price and disbursements therefrom *held* for jury.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

In statutory proceeding by administrator to discover assets which administrator claimed trustee had not paid to estate after foreclosing deeds of trust on realty belonging to estate, evidence that trustee commingled proceeds of foreclosure sale with his own personal funds and that they were not all used for benefit of estate *held* for jury.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Mo. 1949. Title to disputed assets may be tried by probate court in a discovery of assets proceeding, and a money judgment for value thereof may be rendered if party cited is found to have disposed of assets for money after institution of proceeding. Mo.R.S.A. §§ 63–67, V.A.M.S. §§ 462.400–462.440.

State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

Mo.App. 1920. In a proceeding by a public administrator under Rev.St.1909, § 70, V.A.M.S. § 462.400, for discovery of assets which had been divided between defendant and his brother and sisters, evidence as to whether another brother had consented to the division, and as to whether, while confined in the penitentiary, he had been informed by defendant of the division, or had assented to it, *held* to make a question for the jury.

Newell v. Kern, 218 S.W. 443.

Mo.App. 1922. In a proceeding under Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq., by a public administrator against one in possession of property of a deceased person to recover the property, in which defendant admitted that the property had belonged to deceased and claimed title by virtue of a gift from the deceased, which the evidence failed to establish, refusal to direct a verdict for plaintiff was error; the burden of proof being on the defendant.

Newell v. Edom, 242 S.W. 701.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1923. In an action by administrator to recover stock certificate indorsed in blank by the deceased, whether prima facie case of defendant arising from possession of the certificate was destroyed by evidence *held* for the jury.

Newell v. Flesh, 255 S.W. 957.

Mo.App. 1928. In proceeding to discover assets, evidence as to whether property was received as gift from deceased required submission to jury. Rev.St.1919, § 62, V.A.M.S. § 462.400.

Cremer v. May, 8 S.W.2d 110, 223 Mo. App. 57.

Mo.App. 1928. Where note, which defendant contended decedent intended as gift, was in decedent's possession at death, there was no gift inter vivos, and instruction on that subject was unauthorized.

Thompson v. Bratcher, 8 S.W.2d 1027.

Mo.App. 1929. Direction of verdict requiring administratrix to include property of estate admittedly not included *held* not error. Rev.St.1919, § 57, as re-enacted by Laws 1921, p. 120, V.A.M.S. § 462.020.

In re Van Fossen, 13 S.W.2d 1076.

Whether sum which widow had received from husband was repayment of loan *held* for jury.

In re Van Fossen, 13 S.W.2d 1076.

Jury's finding as to value of chickens in discovery proceedings *held* compliance with instruction requiring finding as to number. Rev.St.1919, § 62, V.A.M.S. § 462.400 et seq.

In re Van Fossen, 13 S.W.2d 1076.

Mo.App. 1932. In administrators' proceedings to discover assets, instructions basing right of plaintiffs to recover upon decedent's lack of intention to relinquish ownership of property and defendant's failure to assert title until after decedent's death *held* proper.

Kunst v. Walker, 43 S.W.2d 886.

Mo.App. 1937. Evidence in administrator's action to discover assets of decedent's estate *held* sufficient to justify instruction to find for plaintiff if defendant owned certain property at time of decedent's death and wrongfully withheld and concealed it or any part thereof.

Owens' Estate v. Owens, 107 S.W.2d 150.

Defendant's requested instruction in administrator's action to discover assets of decedent's estate that defendant was presumed to be owner of property in his possession was properly refused; proper instruction being that jury had right to find from facts and circumstances in evidence that defendant owned such property.

Owens' Estate v. Owens, 107 S.W.2d 150.

Defendant's requested instruction in administrator's action to discover assets of decedent's estate that burden of proof was on plaintiff to rebut presumption that defendant owned property in his possession was properly refused; burden of evidence, rather than proof, being involved.

Owens' Estate v. Owens, 107 S.W.2d 150.

Whether property described in affidavit of administrator, suing for discovery of assets of decedent's estate, belonged to defendant or estate was jury question under oral evidence. Mo.St.Ann. § 63, p. 38, V.A.M.S. § 462.400.

Owens' Estate v. Owens, 107 S.W.2d 150.

Mo.App. 1940. In proceeding by administratrix to recover as an asset of the estate a savings account alleged to be wrongfully withheld by daughter of deceased, where account was opened by deceased in the names of deceased and daughter, payable to either or survivor, but there was testimony that deceased retained possession of bank book and that only purpose of the joint account was to enable daughter to get money for deceased in the event of her illness, whether deceased had intended to retain exclusive ownership in herself of the fund deposited was for the jury. Mo.St.Ann. §§ 63, 5400, 5465, pp. 38, 7611, 7660, V.A.M.S. §§ 362.465–362.475, 363.720–363.740, 462.400.

In re Geel's Estate, 143 S.W.2d 327.

Mo.App. 1945. In administrator's proceeding to recover assets, instruction requiring defendant to prove "to your satisfaction" and by preponderance of evidence that decedent authorized him to keep certain money was erroneous but did not require reversal. Mo.R.S.A. §§ 63–66, V.A.M.S. §§ 462.400–462.430.

In re Jacobs' Estate, 188 S.W.2d 956, 238 Mo.App. 833.

Mo.App. 1946. In proceeding by administrator against grandson of deceased for discovery of assets which grandson claimed to have received by gift inter vivos, an instruction which, among other things, stated that if grandson asserted his claim for the first time after death of alleged donor, the claimed gift was regarded with suspicion, was properly refused.

In re Harlow's Estate, 192 S.W.2d 5, 239 Mo.App. 607.

⇐85 (7). Dismissal.

For cases from other jurisdictions, see other Key Number Digests.

For references to other topics, see Descriptive-Word Index

⇐85(8). Judgment and review.

Mo. 1875. Where one not shown to have any interest in an estate files an affidavit, under Wag.St. p. 85, § 7, charging one with embezzling the property of a decedent, and the defendant appeals to the circuit court, the administrator cannot, under Wag. St. p. 120, § 8, for the first time appear and file a new affidavit, and compel the party accused to proceed to trial thereon.

Shaw v. Groomer, 60 Mo. 495.

Mo. 1919. In action under Rev.St.1909, §§ 70–73, V.A.M.S. § 462.400–462.430, charging defendant with withholding certain property belonging to estate of his deceased wife, *held* that one of the main instructions was erroneous where it authorized the jury to charge defendant with interest at the rate of 6 per cent. compounded annually.

Vazis v. Zimmer, 209 S.W. 909.

Mo. 1922. In proceedings under Rev.St. 1919, §§ 62–65, V.A.M.S. § 462.400–462.430, for discovery of assets of an estate wrongfully withheld, where respondent defended on the ground that the property in question was his own by purchase from deceased, a judgment in his favor will be affirmed on appeal, where no assignments of prejudicial error are made and no declarations of law by the trial court were asked or given; it appearing from the record that there is substantial evidence supporting the judgment, and the proceeding being one at law under section 65, § 462.430.

Sexton v. Sexton, 243 S.W. 315, 295 Mo. 134, transferred from Court of Appeals 224 S.W. 47.

Mo. 1928. In proceeding to recover assets of estate in which defendant claimed gift, instruction placing burden of proof on plaintiff to establish facts necessary to verdict *held* prejudicial error. Rev.St.1919, § 62 et seq., V.A.M.S. § 462.400 et seq.

Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.

Mo. 1936. In considering order overruling trustee's demurrer to evidence at close of statutory proceeding by administrator to discover assets which administrator claimed trustee had not paid to estate after foreclosing deeds of trust on realty belonging to estate, Supreme Court would assume that jury found greatest sale price which they had right to find under evidence.

Lolordo v. Lacy, 88 S.W.2d 353, 337 Mo. 1097.

Mo. 1947. On appeal by wife's executor in proceeding to discover assets, reviewing court, upon determining that particular note and mortgage were not wife's separate property, was not required, in absence of appeal by husband's executor, to determine whether note and mortgage were owned as tenants in common or as joint tenants. Mo. R.S.A. §§ 63–67, 3024, V.A.M.S. §§ 401.008, 462.400–462.440.

Clevidence v. Mercantile Home Bank & Trust Co., 199 S.W.2d 1, 355 Mo. 904.

Mo. 1949. Title to disputed assets may be tried by probate court in a discovery of assets proceeding, and a money judgment for value thereof may be rendered if party cited is found to have disposed of assets for money after institution of proceeding. Mo.R.S.A. §§ 63–67, V.A.M.S. §§ 462.400–462.440.

State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

In discovery of assets proceeding in probate court if party concealing or embezzling or otherwise wrongfully withholding assets of the deceased refuses to surrender them, administrator may waive attachment and ask for a judgment for value of assets. Mo.R.S.A. §§ 63–67, V.A.M.S. §§ 462.400–462.440.

State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

Mo.App. 1900. In a proceeding in the probate court, under Rev.St.1889, §§ 74–77, V.A.M.S. § 462.400–462.430, by the executor to discover assets alleged to belong to the estate and which he charges defendant, widow of the decedent, with concealing and withholding from him as such executor, where there is no evidence of any concealment, but defendant claims the property as hers, and the evidence shows the claim was made in honest belief, the circuit court has no authority, on appeal from the probate court, to try the assured's right to the property in dispute, but it can only try the question of the good faith of the claim which was made.

Johnson v. Johnson, 82 Mo.App. 350.

Mo.App. 1910. Rev.St.1899, § 74, Ann. St.1906, p. 362, V.A.M.S. § 462.400, provides that if any person interested in an estate file an affidavit to the effect that any person has concealed or withholds any chattels, etc., of the deceased, the court may cite him to appear. Section 78 (page 364) provides for such proceedings against an executor or administrator. Sections 75–77 (page 363) provide for the hearing of the issue arising on interrogatories, and provide that the court may compel delivery of the property. *Held*, that the statutes only apply to property and the production of the thing itself, and do not authorize a judgment for the value of the thing on failure to produce it.

Williams v. Williams, 129 S.W. 454, 145 Mo.App. 382.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1920. In a proceeding by the public administrator against defendant and son of the intestate, who had received a share in the division of her personalty for the discovery of assets, interest on the recovery was allowable under Rev.St.1909, § 7179, V.A.M.S. § 408.020, where it appeared that defendant had unlawfully withheld assets.

Newell v. Kern, 218 S.W. 443.

Mo.App. 1927. Probate court's order respecting collection of debts is controlling. Rev.St.1919, § 104, V.A.M.S. § 462.390.

Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

Mo.App. 1932. In proceeding by administrators to discover assets, admission in evidence of card containing notations in deceased's handwriting as to cash in drawer about month before he became ill, *held* not prejudicial where verdict was based on positive testimony as to money withheld.

Kunst v. Walker, 43 S.W.2d 886.

Mo.App. 1944. The probate judge did not abuse his discretion in failing to grant an appeal in a proceeding to discover assets where no bond of any kind or cash was tendered. Mo.R.S.A. § 287, V.A.M.S. § 467.050.

State ex rel. Maxwell v. Sevier, 179 S.W.2d 492.

Mo.App. 1945. In administrator's proceeding to recover assets, instruction requiring defendant to prove "to your satisfaction" and by preponderance of evidence that decedent authorized him to keep certain money was erroneous but did not require reversal. Mo.R.S.A. §§ 63–66, V.A.M.S. §§ 462.400–462.430.

In re Jacobs' Estate, 188 S.W.2d 956, 238 Mo.App. 833.

Mo.App. 1946. In proceeding by administrator against grandson of deceased for discovery of assets which grandson claimed to have received by gift inter vivos, where evidence as to the decedent's extensive farm, farm equipment and livestock was admitted without objection, the admission of the inventory and appraisement of estate to show the financial condition of deceased, and thus the greater likelihood of the gift, was not prejudicial. Mo.R.S.A. § 847.140(b).

In re Harlow's Estate, 192 S.W.2d 5, 239 Mo.App. 607.

Mo.App. 1951. In administratrix's proceeding to discover assets of decedent's estate, judgment for value of assets found to have been detained by party charged may be rendered in accordance with such finding and punitive features of statutes disregarded, if waived or made necessary by findings, but penalty for failure to comply with judgment for delivery of specific property or value thereof to administratrix cannot be applied, in absence of finding that such party has the property in his possession or control. V.A.M.S. §§ 462.400 to 462.430.

White v. Hutton, 240 S.W.2d 193.

⇐85(9). Proceedings against executor or administrator.

Mo. 1901. In proceedings against an executor for withholding assets, where defendant admits having received money alleged to have been withheld, but states that it was a gift to him, the burden was on him to establish such fact.

Tygard v. Falor, 63 S.W. 672, 163 Mo. 234.

In proceedings against an executor to recover assets alleged to have been withheld, where the executor claims that such property was given to him by his testator, an instruction that, if deceased gave it during his lifetime to the executor, he was not required to inventory it, was as favorable to defendant as the facts authorized.

Tygard v. Falor, 63 S.W. 672, 163 Mo. 234.

Mo. 1934. In proceeding to compel administrator of decedent's estate to inventory certain property as assets of estate, petition, interrogatories, and answers thereto *held* to constitute pleading and to settle issues.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

Administrator of deceased wife's estate, admitting that certain money originally belonged to wife and that he received it, had burden to establish excuse for withholding it from her estate.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

Administrator of wife's estate claiming right to withhold portion of proceeds of wife's land on theory of repayment of money expended when improving such land *held* required to prove that there was consideration for money received by him.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

In proceeding to compel administrator of deceased wife's estate to inventory certain property as assets of estate, evidence *held* insufficient to take to jury question of administrator's right to withhold money on theory of repayment of money expended by him on wife's land.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

For references to other topics, see Descriptive-Word Index

In proceeding to compel administrator of deceased wife's estate to inventory certain property as assets of estate, whether there was gift from decedent to administrator of proceeds of land *held* for jury.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

In proceeding to compel administrator of wife's estate to inventory certain property as assets of estate, instruction submitting issue of gift by wife *held* erroneous, as not definitely requiring jury to find essential requirements of gift and as being confusing and misleading.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

In proceeding to compel administrator of decedent's estate to inventory certain property as assets of estate, administrator must establish his title to money on allegations of pleading.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

In proceeding to compel administrator to inventory certain property as assets of estate, instruction stating gift to administrator may be proved by circumstances and that jury may consider all facts and circumstances surrounding decedent and administrator, together with decedent's relation to and feeling for or against parties to litigation, *held* not error.

Roethemeier v. Veith, 69 S.W.2d 930, 334 Mo. 1030.

Mo. 1937. Where surviving husband claimed that wife had paid him $1,000 as reimbursement for improvements on wife's farm and had given husband proceeds of note outright, but husband had spent only $582.50 to improve farm, he would be required to account as administrator for remainder of the $1,000, as estate property.

Roethemeier v. Veith, 108 S.W.2d 346, 341 Mo. 706.

Mo. 1943. In proceedings to discover assets brought by certain heirs against administrator, where administrator's answer to interrogatories stated that certain envelopes found in decedent's deposit box had been delivered to the persons whose names appeared thereon as directed by order of court based upon a petition filed by the heirs and waivers signed by them, estoppel was sufficiently pleaded to permit administrator to rely thereon as a defense.

In re Estes' Estate, 166 S.W.2d 1061.

Mo. 1944. Filing of petition in husband's estate by wife's executor for allowance of half of personalty subject to payment of debts was not an independent suit, and neither party was entitled to a jury trial in probate court or in circuit court on appeal, and jury's verdict on trial de novo in latter court was merely advisory. Mo.R.S.A. §§ 325, 327, 329, V.A.M.S. §§ 469.090, 469.110, 469.120.

In re Opel's Estate, 179 S.W.2d 1, 352 Mo. 592.

Mo. 1949. Where administratrix brought discovery of assets proceeding in probate court against executors of another estate and administratrix's affidavit alleged that executors' deceased had embezzled some of assets of her estate which assets executors had in their possession or control, affidavit was sufficient to give probate court jurisdiction in proceeding.

State ex rel. Lipic v. Flynn, 215 S.W. 2d 446, 358 Mo. 429.

Mo. 1951. Where husband as administrator of wife's estate had allegedly withheld or embezzled assets of her estate, but husband's executors never had possession, custody and control of such assets or of the proceeds of sale or other disposition of such assets, the executors were not liable to a money judgment for the value of such claimed assets in statutory proceeding by administratrix de bonis non of wife's estate to discover assets of her estate. V.A.M.S. §§ 462.400 to 462.440.

In re Lipic's Estate, 243 S.W.2d 100, 362 Mo. 623.

Mo.App. 1896. Rev.St.Mo.1889, § 74, V.A.M.S. § 462.400, provides that if the executor or administrator, or other person interested in any estate, file an affidavit stating that affiant has good cause to believe and does believe that any person has concealed or embezzled, or is wrongfully withholding, any goods, chattels, money, etc., of deceased, the court may cite such person to appear before it. Section 75, § 462.410, provides that, if the party cited does not admit the allegation in the affidavit, he should be examined under oath, after which, at the instance of the administrator or executor, other witnesses may be examined both for and against such party. Section 77, § 462.430, provides that the issue upon the interrogatories shall be tried by jury or by the court in a summary manner, and judgment shall be rendered according to the findings and for costs. Section 78, § 462.440, provides that like proceedings may be instituted against executors, and on conviction the court shall compel such executor to inventory the property as property of the estate. *Held*, that, in a proceeding under section 78, § 462.440, to compel an executor to discover assets, the executor is entitled to a dismissal of the proceedings, without further exami-

nation of himself or others, if the finding of the court is in his favor after his examination upon oath.

In re Stuart's Estate, 67 Mo.App. 61.

Mo.App. 1917. In controversy to determine whether deceased was his son's partner, entitling him as executor to withhold funds from estate, instructions requiring all elements of a strict partnership to be found and placing the burden of proof upon the son *held* sufficient.

Denny v. Brown, 193 S.W. 552.

Mo.App. 1920. Evidence for beneficiary of will *held* to have made case for jury in her proceeding to recover assets from the executor, charged with having failed to inventory and account for his own note given testatrix.

In re Skelly's Estate, 223 S.W. 690.

In a proceeding against an executor, under Rev.St.1909, §§ 70–74, V.A.M.S. §§ 462.400–462.440, to compel him to inventory and account for his own note for $1,000 given testatrix, the sole question for the jury was whether or not defendant executor was withholding the note, and they could not return verdict against him pursuant to instruction for the face value of the note with interest from the date of the letters of administration.

In re Skelly's Estate, 223 S.W. 690.

Mo.App. 1931. In proceeding against administratrix and deceased's niece for concealment of assets, whether joint ownership bank account with niece was opened by deceased so that niece could pay deceased's expenses *held* for jury. Rev.St.1929, §§ 5400, 5465, V.A.M.S. §§ 362.465–362.475, 363.720–363.740.

Schnur v. Dunker, 38 S.W.2d 282.

Mo.App. 1938. Where the probate court finds that personalty claimed by widow came into husband's possession from wife with her written assent and that husband died without any child or other descendants in being capable of inheriting, and that the personalty was still included in the estate, the probate court has original jurisdiction to adjudicate the claim, in absence of question of purely equitable cognizance. Mo.St.Ann. §§ 325, 3008, pp. 212, 5064, V.A.M.S. §§ 451.250, 469.090.

Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

On court's dismissal of widow's claim against husband's estate for money which she had received during coverture and which she had allegedly given to him with her written assent, her remedy was by appeal to the Court of Appeals, where no matter of equitable cognizance was involved, rather than by the abandonment of that proceeding and the institution of an original proceeding in the circuit court. Mo.St.Ann. §§ 318, 325, 327, pp. 202, 212, 215, V.A.M.S. §§ 469.010, 469.090, 469.110.

Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

Mo.App. 1943. In statutory proceeding against executor to discover assets, the issues to be tried are made by the interrogatories and answer, and inquiry is not limited to the specific property alleged in the affidavit to have been wrongfully withheld, if claimant by interrogatories has broadened issues to embrace matters disclosed by the original examination under oath. Mo.R.S.A. §§ 63–67, V.A.M.S. §§ 462.400–462.440.

In re Weingart's Estate, 170 S.W.2d 972.

In proceeding against executor to discover assets, where claimant's affidavit alleged only withholding of deed of trust securing note, but claimant's interrogatories inquired whether executor had ever possessed proceeds of the note and executor's answer denied possession, an issue as to such possession was framed and could be submitted to jury by appropriate giving and refusal of instructions. Mo.R.S.A. §§ 63–67, V.A.M.S. §§ 462.400–462.440.

In re Weingart's Estate, 170 S.W.2d 972.

In proceeding by legatee to discover assets withheld by executor, instruction that legatee had burden of proving delivery of deed of trust to testator was properly refused as misleading in indicating necessity of actual manual delivery.

In re Weingart's Estate, 170 S.W.2d 972.

In proceeding by legatee to discover assets withheld by executor, evidence did not require directed verdict for executor on issue of whether executor ever received money for property allegedly converted.

In re Weingart's Estate, 170 S.W.2d 972.

In proceeding by legatee to discover assets withheld by executor, instruction that jury should find for executor if securities involved were released before testator's death, and testator was not "at said time" the owner of such securities, was properly refused as ambiguous as to time as of which ownership must be found.

In re Weingart's Estate, 170 S.W.2d 972.

In proceeding by legatee to discover assets withheld by executor, brought on theory that testator's interest in deed of trust had been destroyed by release and that executor was liable for proceeds thereof, instruction that release of deed of trust might

be considered prima facie evidence that it was not testator's property at time of death was properly refused as outside the issues.

In re Weingart's Estate, 170 S.W.2d 972.

An executor could not relieve himself from duty of accounting for money due estate by showing payment to and release by persons who had no right to receive the fund or release the debt.

In re Weingart's Estate, 170 S.W.2d 972.

Mo.App. 1952. Where surviving husband had appropriated household furnishings which had belonged to deceased wife and omitted such property from inventory of her estate which he prepared as administrator, executor of his estate was not entitled to dismissal of citation against him for discovery of assets belonging to predeceased wife's estate or to a directed verdict in his favor, though citation did not allege that the value of household furnishings belonging to wife exceeded $500 at time of her death. V.A.M.S. §§ 462.010, 462.020, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

Where surviving husband had appropriated household furnishings which had belonged to his deceased wife without having them set apart to him as his property by probate court and the only question involved in proceeding against executor of his estate for discovery of assets belonging to predeceased wife's estate was whether proceeds derived from the rental of such furnishings by executor should be credited to wife's estate, disposition of citation did not depend upon whether such furnishings exceeded the value of $500 at time of wife's death. V.A.M.S. §§ 462.010, 462.020, 462.400, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐86. —— Collection and protection of assets in general.

⇐86(1). Authority and duty in general.

Mo. 1829. Where an intestate's effects are sold under an execution by a sheriff, who, after satisfying the debts, etc., has a surplus in his hands, for which the administrator gives a receipt, but never actually receives the money, *held* that in whatever manner such surplus may have been applied, the administrator must account for it, and, unless he does, his security will be liable on his administration bond.

Chouteau v. Hill, 2 Mo. 177.

Mo. 1851. An administrator is chargeable with interest on uncollected notes in his hands at the rate they bear, and is entitled to credit on payments made by him.

Stong v. Wilkson, 14 Mo. 116.

Mo. 1874. An agent credited the account of a husband with the proceeds of the sale of certain land belonging to the wife, and turned the sum over to the administrator of the husband. *Held*, that the administrator had the right to determine for himself whether the fund belonged to the estate of his decedent, and properly refused to be governed by the credit made by the agent.

Pattison v. Coons, 56 Mo. 169.

Mo. 1875. Where one not shown to have any interest in an estate files an affidavit, under Wag.St. p. 85, § 7, charging one with embezzling the property of a decedent, and the defendant appeals to the circuit court, the administrator cannot there for the first time appear and file a new affidavit, and compel the party accused to proceed to trial thereon.

Shaw v. Groomer, 60 Mo. 495.

Mo. 1883. Wag.St. p. 85, §§ 7–11, providing for the discovery of property of an estate of a decedent which has been concealed or embezzled by any person, is equally applicable to cases where the property is openly held under claim of title as to cases of technical concealment or embezzlement.

Eans' Adm'r v. Eans, 79 Mo. 53.

Mo. 1887. An administrator or executor is responsible for loss by the insolvency of the debtor to an estate, when he has failed to exercise the same care that a prudent man would exercise in the conduct of his own affairs.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Among the assets which came to the hands of B., as executor of decedent's estate, was a note secured by deed of trust. B. qualified in 1867, and at that date and for five years thereafter the land conveyed by the deed of trust was worth the full amount of the note, but it then depreciated 50 per cent. B. paid taxes on the land for several years, but took no steps to foreclose, and suffered the note to be barred by limitation. The maker of the note was insolvent during the whole period, and the land was unoccupied. *Held*, in an accounting between the administrator of B. and the administrator de bonis non of decedent's estate, that B. was negligent in failing to foreclose, and hence his estate was liable for the loss sustained by depreciation of the land, though not for the whole of the note, since his delay had not barred the right to sell under the deed of trust.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo. 1889. In a summary proceeding brought in the probate court under 1 Wag. St. p. 85, § 7, by an administrator, to recover assets of the estate embezzled, fraudulent

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misappropriation by defendant is essential to a recovery, but the openness and notoriety of defendant's possession under a claim of title is not of itself a defense, unless such claim is of a valid title, and made in good faith.

Gordon v. Eans, 11 S.W. 64, 370, 97 Mo. 587, affirming on rehearing 4 S.W. 112, 97 Mo. 587.

Mo. 1889. An administrator must use all reasonable diligence in collecting the debts due the estate, and, if a demand is lost for failure on his part to use that care which a prudent person would use with respect to his own affairs, then he must account for the loss; but, before an administrator can be charged for failure to collect a note, it must be shown that the note came into his possession, or that there was to his knowledge such a subsisting debt due the estate.

Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo. 1891. Under Rev.St.1879, § 240, providing that an executor shall have credit for all debts due the estate where the debtor is insolvent, or where from any other cause it was impossible for the executor to have collected such claim by the exercise of due diligence, an executor who defers the collection of a note which is lost by failure of the maker is not entitled to credit for losses thus sustained, where the will directs the collection of accounts as soon as possible, and it appears that the delay was merely to accommodate the maker, who was believed to be solvent, and that another note due the testator by the same party had been promptly paid.

Powell v. Hurt, 16 S.W. 669.

Mo. 1891. Executors allowed a note given to their testator to run for 11 months after its maturity, during which time the makers failed. They had been insolvent ever since the note was given, but were believed to be solvent, and had high credit up to the time of their failure. The note bore a high rate of interest and the money was not needed for distribution. In the opinion of two witnesses, the makers, if pressed for payment when the note fell due, would have paid it out of trust funds in their possession. *Held*, that the executors should not be charged with said note, since their delay in collecting it was not negligence.

Powell v. Hurt, 17 S.W. 985, 108 Mo. 507, reversing 31 Mo.App. 632.

Mo. 1898. An administrator has authority to accept a certificate of corporate stock owned by his intestate, though it bears an indorsement by the corporation purporting to charge it with a lien for an indebtedness by decedent, since, if unauthorized, such indorsement is a nullity.

Van Liew v. Barrett & Barrett Beverage Co., 46 S.W. 202, 144 Mo. 509.

Mo. 1942. It is an administrator's duty to preserve and collect the estate for benefit of all persons interested in it and to collect inheritance and estate taxes. Mo.R.S.A. §§ 575, 579, V.A.M.S. §§ 145.080, 145.130.

State ex rel. Madden v. Sartorius, 163 S.W.2d 987, 349 Mo. 1054.

Mo. 1949. An executor or administrator has legal title to estate personalty and right to possession thereof during pendency of administration until distribution is ordered and it is his duty to collect and defend it in court if necessary, except where controversy is personal to distributees inter sese or otherwise, and his status as such will authorize him to bring a suit in conversion of estate personalty.

State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

Mo.App. 1900. The fact that an executor accepts notes taken by one who has converted the money of the testator does not discharge the latter from liability, and cannot bind persons interested in the estate and not parties to the transaction.

Haynes v. Carpenter, 86 Mo.App. 30.

Where a man gave his son a power of attorney to collect obligations due and settle up debts and draw checks on bank funds, and the son collected moneys and, after depositing them in a bank, checked them out and reloaned the money, it was the duty of the executor of the father, under Rev.St. 1899, §§ 68–70, 96, V.A.M.S. §§ 462.010–462.030, 537.010, to have inventoried a claim of the estate against the son and proceeded to collect from him the amount so wrongfully reloaned.

Haynes v. Carpenter, 86 Mo.App. 30.

Mo.App. 1905. Where at intestate's death she was entitled to one-sixth of the net proceeds of the crop raised on certain land, it was the duty of her administrator to sue for and recover the same for the benefit of creditors and distributees.

Perkins v. Goddin 85 S.W. 936, 111 Mo. App. 429.

Mo.App. 1937. It became executors' duty to collect note inventoried as asset of deceased's estate after bank, to which deceased pledged it as collateral security for debt, returned it to executors on discovering that deceased's notes evidencing debt were barred by limitations, either by action at law on collateral note or by charging amount thereof against interest in estate devised by de-

ceased to maker, where will did not release or remit latter's debt to deceased.

Studer v. Harlan, 109 S.W.2d 687, 233 Mo.App. 811.

Mo.App. 1941. An administrator obtaining proceeds of life policy from circuit court clerk, pending appeal of divorced wife of deceased in interpleader proceeding between administrator and divorced wife involving the proceeds, had duty to withhold expenditure of proceeds until appellate court could determine whether administrator was entitled to fund, and had duty to return proceeds to divorced wife in full without order of probate court when right of divorced wife to proceeds was finally established by judgment of appellate court, notwithstanding that administrator had expended some of proceeds for attorneys' fees and other expenses of administration.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

⇐86(2). Property in possession of or claimed by heirs, distributees, and others.

Mo. 1943. An order of probate court authorizing administrator to deliver certain envelopes and contents, which were found in decedent's deposit box, to the persons whose names appeared thereon, relieving administrator of the duty to account for such property, in accordance with petition filed by heirs and their waivers and assignments of interests therein, was not an order determining ownership of the property which a court of equity only was authorized to determine.

In re Estes' Estate, 166 S.W.2d 1061.

Mo.App. 1931. Administrator cannot recover proceeds of decedent's estate distributed for her use and benefit with knowledge and consent of sole distributee.

Adamack v. Herman, 33 S.W.2d 135.

Mo.App. 1942. Adult heirs to an estate, whether it be an individual or a partnership estate, may by their consent and agreement estop themselves from asserting that a surviving heir or partner has wrongfully withheld assets of such estate.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

If all heirs interested in a partnership estate, one of partners being deceased, estop themselves from asserting a claim against surviving partner because of surviving partner's management of partnership assets, by their agreement to surviving partner's continued operation of partnership estate, administrator of partnership estate would also be "estopped" to assert claims, if there were no creditors of the estate.

Maynard v. McClellan, 156 S.W.2d 770, 236 Mo.App. 352.

⇐86 (3). Payments to executor or administrator.

Mo. 1892. An administrator is chargeable as such with money collected by him in payment of a debt due to his intestate, even though such payment was made in a foreign state.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo. 1898. A debtor, making payment to an administrator, is not required to see that the latter properly reports such money in his settlements with the probate court. If it is not charged to the administrator, and final settlement is made, this will not preclude such debtor from subsequently showing that he had properly discharged his indebtedness to the estate.

Van Liew v. Barrett & Barrett Beverage Co., 46 S.W. 202, 144 Mo. 509.

⇐86 (4). Extending time for payment.

Mo. 1864. Under the general power of an administrator to preserve the estate, he has authority to assent to an extension of the time of payment of a debt for which his intestate was security, granted by the creditors to the principal debtor.

Smarr v. McMaster, 35 Mo. 349.

⇐87. —— Compromise or release of claims.

U.S.Mo. 1884. An administrator has authority to make a contract with an attorney to prosecute a doubtful claim in favor of the estate for a portion of the proceeds, and to authorize the attorney to compromise the claim as he should please.

Jeffries v. Mutual Life Ins. Co., 4 S.Ct. 8, 110 U.S. 305, 28 L.Ed. 156, affirming, C.C., Jeffries v. Union Mut. Life Ins. Co., 1 F. 450.

C.C.A.Mo. 1914. An administrator may compromise the claim in general without the consent of the beneficiaries, or compliance with statutes like Rev.St.Mo.1909, § 242, Mo. St.Ann. § 234, p. 153, V.A.M.S. § 462.160, relating to the settlement of claims belonging to the estate proper.

American Car & Foundry Co. v. Anderson, 211 F. 301, 127 C.C.A. 587.

Mo. 1883. Plaintiff, as administrator, had authority to release for one-half its face value a judgment lien held by his intestate on certain property which was subject to a prior lien for more than its value, and such act cannot be said to be against public policy; there being no fraud or unfair dealing.

Mosman v. Bender, 80 Mo. 579.

Mo. 1889. An executrix who has accounted for the full amount received by the

compromise of a note belonging to the estate, for less than its inventoried value, is not liable for more than is thus accounted for, where it is shown that the compromise was made in good faith, and that more money was realized thereby than would have been by an attempt to enforce the payment of the note.

Jacobs v. Jacobs, 12 S.W. 457, 99 Mo. 427.

Mo. 1935. Alleged contract between debtor and executors of creditor's estate, whereby executors agreed to accept in full settlement of the debt paid within reasonable time, an amount less than the actual obligation which was evidenced by notes long past due and secured by trust deeds subject to immediate foreclosure, *held* void for want of consideration.

Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversed 73 S.W.2d 288.

Offer by executor to accept from debtor of estate an amount less than actual debt due on two notes which was not accepted by debtor, who expressed doubt as to his ability to obtain the money, *held* at most a continuing offer to be accepted by performance, and which could be withdrawn at any time before performance.

Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversed 73 S.W.2d 288.

Alleged contract between debtor and executors of creditor's estate, whereby executors agreed to accept in full settlement of debt, if an amount less than the actual obligation, *held* not binding on estate where not approved by probate court as required by statute. Mo.St.Ann. § 234, p. 153, V.A.M.S. § 462.160.

Wayland v. Pendleton, 85 S.W.2d 492, 337 Mo. 190, reversed 73 S.W.2d 288.

Mo. 1947. The statute authorizing a personal representative, when unable to collect by law, to compromise any claim against a "debtor" of decedent does not mean literally that claim must be uncollectible at law and uses quoted word broadly enough to include obligor in the sense of a party who owes an obligation to renounce an asserted claim against estate. Mo.R.S.A. § 233, V.A.M.S. § 462.160.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

An administrator has the usual powers of a trustee, including power to compromise actions on doubtful claims as the circumstances may justify.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Mo.App. 1917. If action of administrator in accepting less than face value of notes was not injurious to estate, his motives for such action are immaterial.

Young v. Ray, 193 S.W. 608.

May compromise pending actions or rights of action in favor of decedent.

Mo.App. 1925. Scott v. Crider, 272 S. W. 1010, 217 Mo.App. 1.

Mo.App. 1925. Crider v. Crider, 272 S. W. 1013.

Administratrix's compromise of suit against estate and claims on notes sustained.

Mo.App. 1925. Scott v. Crider, 272 S.W. 1010, 217 Mo.App. 1.

Mo.App. 1925. Crider v. Crider, 272 S. W. 1013.

Mo.App. 1934. Agreement of executor to accept $3,000 in satisfaction of two notes for $2,000 each followed by his acceptance of $1,800 from intermediary with verbal reservation unknown to debtor not to accept $1,200 as payment on second note would not prevent extinguishment of total indebtedness by payment of $1,200.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

Agreement of executor to accept $3,000 in satisfaction of debt of $4,000 secured by trust deeds, of doubtful value *held* enforceable, notwithstanding power to discount debts to pay legacies had terminated because legacies had been paid, since agreement was compromise with debtor of estate rather than discounting of debts due estate.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

Where executor who received partial payment of $1,800 promised to secure probate court's approval of acceptance of $3,000 in satisfaction of $4,000 debt due estate, and there was no showing that court refused approval or that parties interested in estate sought to repudiate compromise as to money received, equity would require executor to accept balance of $1,200 in satisfaction of debt, since equity would consider approval of probate court required by statute for compromise of debt by executor to have been given. Mo. St.Ann. § 234, p. 153, V.A.M.S. § 462.160.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

Mo.App. 1944. If compromise of a note was made at time when note was owned by estate of a decedent, it would not bind one to whom note was transferred by administrator under order of probate court upon settlement of the estate, where it appeared that there was no order of probate court authorizing the compromise settlement. Mo.R.S.A. §§ 233, 240, V.A.M.S. §§ 462.160, 465.340.

Mommel v. Thomas, 181 S.W.2d 168, 238 Mo.App. 403.

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In suit on note brought by one to whom note had been transferred by administrator upon settlement of estate of a decedent, where it appeared that any compromise settlement of the note while it belonged to estate was not binding because not authorized by probate court, a letter from plaintiff to defendant wherein plaintiff indicated that he would release mortgage securing payment of the note should have been excluded as irrelevant. Mo.R.S.A. §§ 233, 240, 3137, V.A.M.S. §§ 401.122, 462.160, 465.340.

Memmel v. Thomas, 181 S.W.2d 168, 238 Mo.App. 403.

⇐88. —— Debts due from executor or administrator.

Mo. 1876. Wag.St. p. 87, § 32, providing that a debt due from an executor to the decedent shall not be discharged, "but it shall be assets in his hands," does not give such debt the character of cash on hand, so as to oblige the executor to account for it, irrespective of his solvency or insolvency.

McCarty v. Frazer, 62 Mo. 263.

Mo.App. 1881. An administrator, before he can take credit for an account as uncollectible, must show that he used that degree of care and diligence which a prudent man would use in regard to his own affairs in attempting to collect it; and, where the administrator is the debtor, he cannot take credit for the account on the ground of his insolvency, if he had any property with which to pay the claim. It is impossible for him as administrator to discharge from his mind the knowledge which he has of of his own personal affairs.

In re Haffey's Estate, 10 Mo.App. 232.

Mo.App. 1900. A judgment on final settlement, which not only charges the administrator with a debt due by him to the estate as though inventoried, but compels him to pay it, is erroneous, since a debt owing by an administrator to the estate is only an asset in his hands, and is to be administered as such.

Wilson v. Ruthrauff, 82 Mo.App. 435.

An administrator cannot escape a debt to the estate merely for the reason that he may honestly believe that there is no such debt. It is his duty under the statute to inventory it, and if he fails to do so, however conscientious he may be, he and his sureties will be liable on his bond.

Wilson v. Ruthrauff, 82 Mo.App. 435.

⇐89. —— Failure to collect.

Mo. 1889. Where the inventory filed by the administrators mentions a note payable to decedent, but the amount appears to have been erased before the inventory was completed, and there is no other evidence that the note came into their possession, or that they knew of such a debt due the estate, they will not be charged for failure to collect the alleged note.

Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo.App. 1904. Soon after a wife gave her note for $1,500 to secure a loan to her, her husband, who was without means, paid debts amounting to $1,300. After the death of the payee, the husband, who became one of his executors, made no attempt to collect the note for the estate, though the wife received bequests after its maturity from other persons amounting to $800, which she received to the knowledge of the husband, and part of which she turned over to him. She died without means. The other executor used no diligence in the matter. *Held*, that the executors were at least guilty of gross negligence, rendering them liable on the note, as an available asset of the estate.

Hallway v. Eckler, 80 S.W. 46, 105 Mo. App. 585.

Mo.App. 1913. Under Rev.St.1909, § 240, V.A.M.S. § 465.180, the probate court may credit an administrator on debts which it is convinced are uncollectible.

Smith v. Young, 160 S.W. 822, 177 Mo. App. 482.

⇐90. Custody and management of estate.

⇐91. —— In general.

Mo. 1884. The responsibility of an executor will continue as such in respect to property and funds belonging to minor heirs and legatees, and he cannot, while acting in the capacity of an executor, be charged as a curator or guardian.

Cruce v. Cruce, 81 Mo. 676.

Mo. 1924. Executor *held* grossly negligent in handling an estate, where it proceeded as a trustee rather than as executor and piled up court costs for 13 years after a final settlement should have been made.

In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

Mo. 1933. In all material respects, duties and liabilities of individual administrator or executor and public administrator are the same. Rev.St.1929, § 300, V.A.M.S. § 461.-840.

State ex rel. Russell v. Mueller, 60 S.W. 2d 48, 332 Mo. 758, 91 A.L.R. 705.

Mo. 1942. Executors and administrators stand in position of "trustees" to those interested in estates upon which they administer, and are liable only for want of due care and skill, and measure of care and skill required of them is that which prudent men exercise

in direction and management of their own affairs.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1884. Executors and administrators stand in the position of trustees for those interested in the estates which they administer, and in their management generally are liable only for want of due care and skill such as prudent men exercise in the management of their own affairs.

Lewis v. Carson, 16 Mo.App. 342.

Mo.App. 1886. Under Rev.St. §§ 100, 101, authorizing the administrator to procure labor necessary to preserve property, he may hire and board hands and buy food, if needed to preserve the property, and, where such articles have been furnished on credit, the person furnishing them may have a claim therefor allowed against the estate.

Powell v. Powell, 23 Mo.App. 365.

Mo.App. 1888. Where an administrator deposits funds of the estate in a bank of good standing in the community, he is not responsible for a loss occurring by the unexpected failure of the bank; nor will the fact that the deposit is in his individual name alter the case, if there is no mingling with his own funds and the bank is aware that the deposit is of estate funds.

Atterberry v. McDuffee, 31 Mo.App. 603.

Mo.App. 1917. Administrator in management of estate is only required to use such care and diligence as reasonably prudent person would use in management of his own affairs.

Young v. Ray, 193 S.W. 608.

Mo.App. 1927. Executors and administrators, as trustees, are generally liable only for want of due care.

Harms v. Pohlmann, 207 S.W. 138, 222 Mo.App. 276.

Mo.App. 1936. Executor is liable as such for funds of estate in his hands and for his acts with respect thereto until he qualifies and becomes entitled to hold fund in capacity distinct from that of executor and does so hold it.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

⇐92. — Performance of decedent's obligations.

Three parties made a partition among themselves of a tract of land held by them as tenants in common, and in the deed contracted that, in the event of any suit or suits being prosecuted by or against the parties aforesaid, or either of them, involving the title of the person under whom they all claimed, the expenses should be borne equally by the said parties. The contract terminated in these words, "for the performance of which we bind ourselves, our heirs, executors, and administrators." A suit was brought by the administrator of one of the three parties, against the heirs and devisees of one of the other two, for expenses of suits concerning the title to said land, prosecuted and defended by said administrator after the decease of his intestate. It was *held* that, as the administrator took no interest in the land except a naked power to sell for the payment of debts, he had no authority to prosecute these suits, or to incur their expense, at the charge of the defendants or their ancestors.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 482, 93 Am.Dec. 311.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 486.

Held, further, that the contract concerned only the personal acts of the parties named.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 482, 93 Am.Dec. 311.

Mo. 1867. Sturgeon v. Schaumburg, 40 Mo. 486.

Mo.App. 1893. Where the executrix of one who had a contract to erect a building, after the death of her testator, but before her qualification as executrix, carried on the contract in the place of testator, both with the owner of the building and with one furnishing material, her acts in such regard became chargeable against her as executrix on her subsequent appointment as such.

Bambrick v. Webster Groves Presbyterian Church Ass'n, 53 Mo.App. 225.

Rev.St.1889, § 100, V.A.M.S. § 462.190, provides that if any person die, leaving any property so exposed as to be in danger of loss in value or work in an unfinished state, so that the estate would suffer material loss from the want of care and additional labor, the executor or administrator may, until the meeting of the court, procure such indispensable labor to be performed on the most reasonable terms that he can. *Held*, that the executrix of a deceased building contractor was in the proper discharge of her duties in carrying on the contract, as regarded the owner and materialmen, until the next term of the court.

Bambrick v. Webster Groves Presbyterian Church Ass'n, 53 Mo.App. 225.

Mo.App. 1894. An owner assigned the use of his patent process to two persons, granting to the assignees the exclusive right to use the process within a specified territory. *Held*, that the contract of assignment was assignable, so that, on the death of one

of the assignees, his representative could perform the same.

Empire Pav. & Const. Co. v. Prather's Adm'r, 58 Mo.App. 487.

Mo.App. 1926. On death of a factor, where agency is coupled with an interest, his administrator may continue to exercise factor's powers so far as necessary to protect his estate.

Boatmen's Bank v. Vandiver, 281 S.W. 144.

⇐93. — Continuance of decedent's business.

⇐93(1). In general.

D.C.Mo. 1950. In Missouri, probate court may, upon a proper showing, order continuance of business of decedent.

U. S. v. Pettyjohn, 93 F.Supp. 177, cause remanded 192 F.2d 322.

Mo. 1942. The administration laws are designed primarily for closing of estates of decedents and do not impose obligation to continue business of decedent when unprofitable or burdensome. Mo.R.S.A. § 1 et seq., V.A.M.S. § 461.130 et seq.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1913. An administrator, who continues his intestate's retail mercantile business may not bind the estate by purchasing and agreeing to pay for merchandise for resale in the business.

Silsby v. Wickersham, 155 S.W. 1094, 171 Mo.App. 128.

Mo.App. 1927. Continuance of retail business with acquiescence of court and parties interested *held* proper under order authorizing private sale of merchandise.

Harms v. Pohlmann, 297 S.W. 138, 223 Mo.App. 276.

Mo.App. 1941. An administrator carrying on intestate's business without court order or engaging in business with funds of intestate's estate is guilty of breach of trust and charged with all losses incurred without being allowed benefits of any profits made.

Metzger v. Metzger, 153 S.W.2d 118, transferred 145 S.W.2d 380.

An administrator carrying on intestate's business without court order or engaging in business with funds of intestate's estate may be required to account for any profits realized but such profits belong to estate.

Metzger v. Metzger, 153 S.W.2d 118, transferred 145 S.W.2d 380.

⇐93(2). Provisions of will.

Mo.App. 1897. Testatrix, the owner of a business, declared in her will that the business should be continued after her death by her husband, who should receive for his services a certain per cent. of the net profits of the business, and that the remainder of the profits should be paid to the executor for the benefit of the estate. The probate court placed the husband in charge of the business. The husband continued the business, sold goods, and bought goods. He finally became insolvent, and a seller of the goods obtained judgment against him for their price, on which judgment execution was issued, which was returned nulla bona. It appeared that the executor had in his hands more than sufficient to pay this debt. There was no direct evidence that the money in the hands of the executor was derived from the store, but it was shown that the husband of the testatrix in the management of the business had paid various sums to the executor. *Held* sufficient to make the executor liable for the value of the goods.

M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co., 72 Mo.App. 514.

⇐94. Partnership.

D.C.Mo. 1950. The operation of a partnership may be continued after the death of a partner and such continuance may be had pursuant to an agreement or the will of deceased partner or the order of probate court having jurisdiction of estate of deceased partner.

Wright v. R. & L. Market, 9 F.R.D. 559.

Mo. 1847. A note given by a surviving partner to the administrator of his deceased copartner is valid, although the administrator has not, in the settlement of his intestate's interest in the partnership, pursued the strict course prescribed by statute.

Buckham v. Singleton, 10 Mo. 405.

Mo. 1847. A slave, the property of A. and B., partners, was sold under an execution against A. for his individual debt; and, after the death of A., his administrator sued the purchaser to recover the slave, on the ground that the partnership property was insolvent. *Held*, that the administrator was not entitled to maintain the action, as he had no right to the partnership property not in possession of his intestate at the time of his death.

Darby v. Swartz, 11 Mo. 217.

Mo. 1855. The administrator of a deceased partner gave notice to the surviving partner that unless he should give bonds, as required by sections 50 and 51 of the administration act, Rev.Code 1845, p. 70, he (the administrator) would move the county court for an order directing him (the administrator) to take charge of and administer the property of the firm. This was held a good citation.

James v. Dixon, 21 Mo. 538.

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Mo. 1873. No exception arises as to the rule that an administrator has no authority to transfer assets, except such as have their situs within the territory of the government granting the letters, in cases where the assets in question were held by the decedent as a surviving partner.

In re Ames' Estate, 52 Mo. 200.

⇐95. Contracts.

⇐96. —— In general.

U.S.Mo. 1870. A contract which has for its object a faithless abandonment of the duties of an administrator is not enforceable.

Forsyth v. Woods, 78 U.S. 484, 11 Wall. 484, 20 L.Ed. 207.

Mo. 1877. An executor has power to contract for an extension of time of payment of a debt incurred by the decedent.

North v. Walker's Adm'r, 66 Mo. 453, affirming North v. Walker, 2 Mo.App. 174.

Mo.App. 1886. The administrator and the widow of a decedent arranged that the widow should occupy the farm during her quarantine, and that the stock should remain in her possession, in order to carry out an express wish of her deceased husband. *Held*, that the law did not raise an implied contract that she should be compensated for pasturing the stock on the premises during the time the arrangement continued.

Powell v. Powell, 23 Mo.App. 365.

Mo.App. 1943. Executory contracts made between an executor as the promisor and another are the personal contracts of the executor, and he is personally liable thereon unless it be clearly stated in the contract that the promisee will look exclusively to the estate for payment.

Kopp v. Moffett, 167 S.W.2d 87, 237 Mo. App. 375.

⇐97. —— Services.

Mo. 1943. Administrator making a contract for legal services to be rendered to an intestate's estate is personally bound and the estate is bound so far as the services are necessary or beneficial and the charges reasonable, and to that extent the attorney's claim is an "expense of administration" which must be allowed prior to claims of creditors. Mo.R.S.A. §§ 220, 224, 2450, V.A.M.S. §§ 465.100, 465.110, 484.030.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where attorneys' contract with administratrices provided that attorneys would represent the estate and the administratrices in all matters except as to personal claims of the attorneys against the estate and that their fees should be such reasonable fees as the court should find to be proper, the contract was valid with respect to reasonableness of the charges to be made.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

When an administrator employs an attorney to represent his estate, the contract has a double aspect in that the administrator is personally bound thereby and the estate is also bound thereby in so far as the services rendered to it were necessary or beneficial and the charges reasonable.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Administratrices properly employed counsel at the expense of their estate to combat decedent's notes and claims against his estate by claimant as his widow and heir. Mo.R.S.A. § 306, V.A.M.S. § 468.010.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo. 1947. An executor making a contract with attorneys for legal services to be rendered estate can bind estate for payment as an expense of administration only insofar as the services are necessary or beneficial to the estate and the charges therefor are reasonable. Mo.R.S.A. §§ 220, 2450, V.A.M.S. §§ 465.100, 484.030.

In re Sternberg's Estate, 204 S.W.2d 761.

An executor is not authorized to delegate to an attorney his own fiduciary duties and charge the estate therefor as for legal advice and service. Mo.R.S.A. §§ 220, 2450, V.A.M.S. §§ 465.100, 484.030.

In re Sternberg's Estate, 204 S.W.2d 761.

Personal representative of deceased although a lawyer, may properly employ another attorney to assist him in administration of estate and charge his fees against estate if legal services by another attorney are necessary. Mo.R.S.A. §§ 220, 2450, V.A.M.S. §§ 465.100, 484.030.

In re Sternberg's Estate, 204 S.W.2d 761.

Mo.App. 1886. The administrator and the widow of a deceased arranged that the live stock of the estate should remain on the farm; the administrator furnishing the hands necessary to take care of the stock, as authorized by Rev.St. §§ 100, 101. The widow boarded the hands so furnished. *Held*, that the widow was entitled to recover the expenses of boarding the hands so furnished up to the meeting of the first term of the probate court.

Powell v. Powell, 23 Mo.App. 365.

Under Rev.St.1879, §§ 100, 101, authorizing an administrator to procure until the meeting of the court indispensable labor to be performed, and providing that the court may authorize further labor to be performed as the interest of the estate requires, an administrator can procure indispensable labor to be performed only until the first meeting of the probate court, and thereafter the power and discretion of continuing the provision for labor is alone in the court.

Powell v. Powell, 23 Mo.App. 365.

Under Rev.St. §§ 100, 101, authorizing the administrator of decedent, leaving stock requiring attention, to procure until the meeting of the court indispensable labor to be performed, and authorizing the court to authorize further labor to be performed as the interests of the estate require, an administrator may hire and board hands to preserve the property.

Powell v. Powell, 23 Mo.App. 365.

Mo.App. 1893. An attorney, who makes a contract with an administrator to defend him in his official capacity, may prosecute his claim for such services directly against the estate.

Nichols v. Reyburn, 55 Mo.App. 1.

Mo.App. 1895. An administrator has no power to contract for the services of an accountant to make separate accounts for the estate and for each of the heirs; the former being in preparing accounts for the annual settlement, and the latter being services rendered to the administrator as agent for the heirs in settling the rent accounts of the heirs with him.

Yeakle v. Priest, 61 Mo.App. 47.

Mo.App. 1902. An administrator can, subject to the approval of the probate court, employ an agent to perform necessary labor on behalf of the estate, and engage legal counsel for the same purpose.

In re Ansley's Estate, 68 S.W. 609, 95 Mo. App. 332.

Mo.App. 1913. Where an administrator in good faith, acting with ordinary prudence, employs an attorney to defend an action against the estate, and the attorney acts with reasonable professional judgment, his employment is for the benefit of the estate so as to entitle him to recovery against it for services.

Dooley v. Welch, 158 S.W. 454, 172 Mo. App. 528.

Mo.App. 1933. Where divorced wife's claim was combined with husband's claim against German Empire and wife's claim was rejected, but husband's claim was paid and proceeds came into hands of his administratrix, wife had no interest in fund and her attorney acquired no interest therein under agreement with her giving him one-third of amount recovered.

Turner v. Moore, 57 S.W.2d 770.

Administratrix could not contract with attorney so as to vest attorney with vested interest in fund secured on claims owing estate and preclude same from becoming asset of estate paid into hands of administratrix. Rev.St.1929, § 222, V.A.M.S. § 465.090.

Turner v. Moore, 57 S.W.2d 770.

Mo.App. 1943. The personal representative and not the estate is as a rule directly liable to one whom the personal representative employs incidentally in the discharge of his trust, as for selling, custody of, or suitable work on the assets, or clerical or other services in managing the property and the like.

Kopp v. Moffett, 167 S.W.2d 87, 237 Mo. App. 375.

⇐98. —— Borrowing money.

For cases from other jurisdictions, see other Key Number Digests.

⇐99. —— Bills and notes.

Mo. 1876. A promissory note, given by an executor for services to the estate, which does not expressly promise to pay out of the estate alone, is the personal note of the executor and does not bind the estate, though signed by the executor in his official capacity; but he has recourse over to the assets of the estate.

Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am.Rep. 215.

Mo. 1877. An executor or administrator may, for the purpose of preventing a sacrifice of property covered by a deed of trust, consent to an extension of the time of payment of the note secured thereby.

North v. Walker's Adm'r, 66 Mo. 453, affirming 2 Mo.App. 174.

Mo. 1881. An administrator, signing a note describing himself as administrator, is personally liable, unless it is expressly stated in the note that payment will be made only from the estate.

Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101.

Mo. 1883. A note, executed by an administratrix, and signed "S. M. W. Administratrix and Tutrix to the Minor Children of W. D. W.," binds her personally, and does not bind the estate.

Stirling v. Winter's Ex'r, 80 Mo. 141.

Mo.App. 1891. An administrator has no power to bind the estate by the execution of

a note, creating a new obligation against the estate; but such a note is his own personal note, and a surety thereon is his surety, and not a surety of the estate, and does not become a creditor of the estate by paying the note or a portion thereof.

Crowley v. McCrary, 45 Mo.App. 350.

⇐100. —— Guaranty or suretyship.

Mo.App. 1928. Decedent estate was not bound on guaranty, even though it had been executed by executor or administrator.

International Store Co. v. Barnes, 3 S.W. 2d 1039.

⇐101. Investments.

⇐102. —— In general.

Mo. 1880. Where an administrator invested the funds of the estate in bonds issued by a religious society and secured by a trust deed constituting a first lien on the church building, without the advice or direction of the court, to which he was entitled, under Wag.St. p. 90, § 57, he was not entitled to credit in his final settlement for the amount so invested.

Garesche v. Priest, 9 Mo.App. 270, affirmed 78 Mo. 126.

Mo. 1883. When an administrator, without first being authorized by the probate court, lends out or invests the funds of the estate, he does so at his own risk.

Garesche v. Priest, 78 Mo. 126, affirming 9 Mo.App. 270.

Mo. 1943. An executor under will giving him full power and discretion to invest funds of testator's estate in any manner he deemed proper and providing that, if he survived two other persons, he should become absolute owner of entire estate, had no legal right to invest such funds in his own name, and where he predeceased one of such persons, such survivor could recover funds so invested or property in which invested from anyone except innocent purchaser for value without knowledge or notice.

Woodbury v. Connecticut Mut. Life Ins. Co., 166 S.W.2d 552, 350 Mo. 527.

⇐103. —— Loss or depreciation.

Mo. 1875. An executor is not chargeable for losses incurred by investment of the funds in his hands in gold coin, where the transaction was in good faith, and more particularly where the heirs ratify and consent to such investment.

Gamble v. Gibson, 59 Mo. 585.

⇐104. Interest on funds of estate.

⇐104 (1). In general.

Mo. 1858. Executors and administrators are not chargeable with interest on assets in their hands as of course; but there must be special circumstances to warrant such a charge.

Madden's Heirs v. Madden's Adm'r, 27 Mo. 544.

Mo. 1871. Executors and administrators are not to be charged with interest upon the inventory and sale bill as of course. Where interest has not been actually collected, it is a matter of discretion with the probate court whether to charge them with it or not.

Clyce v. Griswold's Ex'r, 49 Mo. 37.

Mo. 1880. Where an administrator sold property of the estate, taking notes of parties then and for some time thereafter solvent, and failed to settle the estate for 18 years, at the end of which time his letters were revoked, he was properly charged with interest on the uncollected notes at the rate they bore; with three rests.

Scott v. Crews, 72 Mo. 261.

Mo. 1881. Where an administrator makes an improper application of the assets, he will be charged with interest on the amount, and similarly where he purchases property of the estate at his own sale.

Julian v. Wrightsman, 73 Mo. 569.

An administrator is properly charged with interest, where he has made a misapplication of assets.

Julian v. Wrightsman, 73 Mo. 569.

Mo. 1884. Under Rev.St.1879, § 232, providing that the probate court shall exercise an equitable control in making executors and administrators account for interest, the probate courts will follow the practice prevailing in equity in charging trustees with interest.

Cruce v. Cruce, 81 Mo. 676.

Mo. 1906. Where an executor and testamentary trustee acted in good faith, and believed on the advice of counsel that the proceeds of certain land sold by him belonged to him, and the various sales ran through a period of 14 years, and he received no interest, and the heirs of the devisees and legatees allowed a period of about 18 years to pass after the final settlement in the probate court and 10 years after the executor began selling the land before they claimed any interest therein, in a suit by them to compel him to account, in which it appeared that he was not entitled to such proceeds, he should not have been charged interest.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

Mo. 1924. Under Rev.St.1919, §§ 222, 223, V.A.M.S. §§ 462.270, 465.080, an administratrix, who purchased real estate indi-

vidually at a sale under a deed of trust, and, pending a suit to set aside her purchase and have the real estate partitioned, did not use the surplus proceeds paid her by the trustee, or deposit them on interest, was not chargeable with interest thereon.

In re Wenzel's Estate, 263 S.W. 110, affirming In re Wenzel, 243 S.W. 395.

Mo. 1929. That trust company at all times had ample funds to pay demands of decedent's creditors and legatees did not absolve it from paying interest on estate funds received as executor. Rev.St.1919, § 222, V.A.M.S. § 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Heirs *held* not estopped from claiming interest on estate funds used by executor because they failed to make claim until after final settlement. Rev.St.1919, § 222, V.A.M.S. § 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Legatees signing receipts in full settlement *held* not estopped from claiming interest on funds of estate used by executors. Rev.St.1919, § 222, V.A.M.S. § 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Mo.App. 1896. Where an administrator had in his hands for a period of five years or more at least $1,000 belonging to the estate, it was not unreasonable to require him to pay four years' interest thereon at the rate of 6 per cent. per annum.

In re Danforth's Estate, 66 Mo.App. 586.

⇐104 (2). Failure to invest funds or deposit them in interest-paying bank.

Mo. 1876. The rate of interest chargeable to executors and administrators under Wag.St. p. 90, §§ 54, 55, on funds of the estate retained in their hands will be varied to suit the circumstances of the case; a less rate being charged where the money is simply allowed to lie idle than where the representative uses it in his private business.

In re Davis, 62 Mo. 450.

Mo. 1886. An administrator is not chargeable with interest on money of the estate deposited in bank without interest, and separate from his own, though he could have obtained from the probate court an order for its investment.

Scudder v. Ames, 14 S.W. 525, 89 Mo. 496.

In an administration, where there were no debts, the administrator collected over $1,000, and delayed settlement for over five years without valid excuse, during which time the money was on deposit in a bank drawing no interest. *Held*, that he was properly charged with four years' interest at 6 per cent.

Mo.App. 1896. In re Danforth's Estate, 66 Mo.App. 586.

Mo.App. 1896. McCanse v. Goffe, 66 Mo. App. 586.

⇐104 (3). Mingling and using funds for individual benefit.

Mo. 1876. Where an executor used the money of the estate in his own business for three years, the action of the probate court in charging him with 8 per cent. interest, with annual rests, would not be disturbed.

In re Davis, 62 Mo. 450.

Mo. 1876. An administrator was properly charged with compound interest on money collected by him and mingled with his private funds without properly accounting therefor.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1879. An administrator is properly charged with 10 per cent. compound interest, with annual rests, on moneys of the estate which he used in his own business and failed to account for; and the failure or refusal to account will raise a presumption of use of the funds.

In re Camp's Estate, 6 Mo.App. 563, affirmed Camp's Creditors v. Camp's Adm'r, 74 Mo. 192.

Where an executor received funds of the estate, with which he did not charge himself in his account, he was liable for 10 per cent. compound interest thereon.

In re Camp's Estate, 6 Mo.App. 563, affirmed Camp's Creditors v. Camp's Adm'r, 74 Mo. 192.

Mo. 1884. Where an executor kept money, in his hands, pursuant to directions in the will, for many years and until the heirs reached majority, without investing it, but mingling it with his own and using it in his own affairs, he was charged with simple interest at 10 per cent.; that being the highest rate paid by safe investments during the period.

Cruce v. Cruce, 81 Mo. 676.

Where an executor has charged himself with simple interest on the funds of the estate used by him, and such charge has been approved by the court in his settlements, it would hardly seem just to impose upon him compound interest for the same period.

Cruce v. Cruce, 81 Mo. 676.

The imposition of compound interest on a trustee using the funds of the estate in his own business is not necessarily intended as

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a penalty, but may be resorted to as a means of arriving at the just earning capacity of the fund.

Cruce v. Cruce, 81 Mo. 676.

Mo. 1889. The duty of the probate court, under Gen.St.1865, p. 493, § 55, at each settlement, to exercise an equitable control in requiring administrators to account for interest on moneys of the estate loaned or used by them, is to be exercised equitably and in view of all the circumstances.

Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo. 1896. Under Rev.St.1889, § 224, V.A.M.S. § 465.270, providing that if executors and administrators lend deceased's money, or "use it for their own private purposes, they shall pay interest thereon to the estate," where a surviving partner administers the partnership estate, and during the first year uses the money of the estate in his own business, the probate court has no discretion to relieve him from payment of the interest.

Reilly v. Reilly, 34 S.W. 847, 133 Mo. 463.

Mo. 1929. Statute requiring executor using trust funds for own purposes to pay interest thereon is mandatory; that executor is trust company being immaterial. Rev.St. 1919, §§ 222, 11801, subd. 6, V.A.M.S. §§ 363.200, 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Mo.App. 1902. Where an executor deposits the money of an estate in a bank to the credit of an account in which the money used in his ordinary business is kept, and on which he regularly draws checks, he makes use of the money in such a way that he must pay interest on it to the estate.

In re Burke's Estate, 70 S.W. 156, 96 Mo.App. 295.

⚖104(4). Delay in settlement of estate.

Mo. 1929. Delay in making final settlement caused by suit to construe will *held* not to affect trust company's liability as executor for interest. Rev.St.1919, § 222, V.A.M.S. § 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Trust company executor *held* not relieved from liability to estate for interest by heirs' failure to have result of suit to construe will certified to probate court. Rev. St.1919, § 222, V.A.M.S. § 462.270.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

⚖104(5). Assets reserved to meet contingencies.

Mo. 1887. Where there is a contest over the will, the executor should not be charged interest on moneys retained by him to meet the expenses of the contest, when the amount so retained is reasonable and proper.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

⚖104(6). Rate and computation of interest.

U.S.Mo. 1871. Where the state law allows interest at the rate of 10 per cent. per annum, the supreme court will not reverse a decree of the court below because it allowed 8 per cent., with annual rests, against an administrator who had mixed the administration funds with his own and been guilty of other irregularities.

Hook v. Payne, 81 U.S. 252, 14 Wall. 252, 20 L.Ed. 887.

Mo. 1886. An administrator having willfully omitted to account in his settlements for money collected, he is chargeable only with simple interest at the rate fixed by statute to be paid when no other is agreed on.

Scudder v. Ames, 14 S.W. 525, 89 Mo. 496.

Mo. 1929. Trust company loaning out estate funds received as executor *held* properly required to account for interest at 6 per cent. on daily balances. Rev.St.1919, §§ 222, 223, 11801, subd. 9, V.A.M.S. §§ 363.-200, 462.270, 465.080.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

⚖105. Deposits.

Mo.App. 1924. Whether money belonging to an estate shall be kept in a bank as a general deposit, in safety deposit boxes, or some other safe place, or on the administrator's person, is a matter of judgment and discretion on the part of the administrator, and is of no concern to the probate court on final settlement.

Williams v. People's Bank of Springfield, 257 S.W. 192.

⚖106. Loans.

Mo.App. 1936. Administratrix loaning money to husband without permission of probate court was liable in her individual capacity to parties to whom she and her husband conveyed their property by warranty deed and without notice that property was incumbered by unrecorded trust deed executed by husband and wife as security for such loan. Mo.St.Ann. §§ 104, 3039, 3041, pp. 66, 1879, 1881, V.A.M.S. §§ 442.380, 442.400, 462.-260.

White v. Hughes, 88 S.W.2d 268.

For references to other topics, see Descriptive-Word Index

⇐107. Gifts.

For cases from other jurisdictions, see other Key Number Digests.

⇐108. Expenditures.

⇐109. —— In general.

⇐109(1). In general.

Mo. 1887. When, by excluding from the executor's credits other unwarranted credits, it appears that there was no necessity for the executor's advancing money to the estate, he will not be allowed interest on the amount so advanced.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo. 1911. Credit allowed executors of a payment to a railway company to assist it to rebuild a portion of its track was improper where there was no provision in the will authorizing such payment.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo.App. 1880. There was no error in allowing as credits the vouchers for amounts paid from time to time by the consent of the probate court for the benefit of the widow and children, since, although it does not appear that a regular order was entered for these, it was competent to prove that the executor had authority in fact.

Schoeneich v. Reed, 8 Mo.App. 356.

Mo.App. 1889. Where an administrator has, in good faith and for the benefit of the estate, redeemed mortgaged property of the estate of much greater value than the incumbrance, he may apply to the probate court, under Rev.St. § 143, V.A.M.S. § 462.-370, for credit for the amounts so paid out, though no previous authority was obtained.

Meeker v. Straat, 38 Mo.App. 239.

Mo.App. 1940. In final settlement of decedent's estate, executor was not entitled to credit for payment of parish priest for masses, since such debts were not created by decedent and were not costs of administration and, not being allowed or subject to allowance by probate court, could not be allowed as credits to executor.

In re Flynn's Estate, 142 S.W.2d 1069.

Mo.App. 1946. Where appointment of public administrator as administrator of deceased's estate was void as not authorized in law, administrator was not entitled to have his fees and expenses allowed. Mo.R.S.A. § 295 et seq., V.A.M.S. § 461.780 et seq.

Donelson's Estate v. Gorman, 192 S.W. 2d 29, 239 Mo.App. 300.

⇐109(2). Funeral expenses, tombstones, and burial places.

Mo. 1911. An allowance to executors of credit for the funeral expenses of one of the devisees under the will was improper, where there was no provision in the will authorizing such payment.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo. 1946. Expenditure of a reasonable amount for a monument for deceased with court approval is authorized by statute, even where no testamentary provision authorizes such expenditure. Mo.R.S.A. § 181, V.A.M.S. § 464.010.

Odom v. Langston, 195 S.W.2d 466, 355 Mo. 115.

Mo.App. 1940. Where executor by order of probate court was authorized to purchase a monument, and no appeal was taken from the order, on final settlement of the estate executor was entitled to credit for the amount expended for the monument.

In re Flynn's Estate, 142 S.W.2d 1069.

⇐109(3). Services.

Mo. 1876. While a note given by an executor for services to the estate is the personal debt of the executor, where it does not expressly promise payment from estate funds only, yet the executor, on payment, may reimburse himself from the estate.

Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am.Rep. 215.

Mo. 1889. An executrix is not entitled to an allowance for commissions paid her agents for effecting the sale of real estate of her testator, beyond the "commission of 5 per cent. * * * on money arising from the sale of real estate," allowed to executors and administrators by Rev.St. § 229, V.A.M. S. § 465.140.

Jacobs v. Jacobs, 12 S.W. 457, 99 Mo. 427.

Mo. 1936. Executor *held* not entitled to credit for proportionate part of stenographer's salary for stenographic work for estate, where stenographer was not paid specifically for services to estate but received regular salary for doing general stenographic work for executor.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

⇐109(4). Traveling expenses.

Mo. 1876. Expenses of a trip to a distant state, undertaken by the administrator with the advice of counsel and for the benefit of the estate, should be allowed, though the administrator was interested as a legatee.

Williams v. Petticrew's Heirs, 62 Mo. 460.

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Mo. 1898. Traveling expenses in the care and preservation of the estate are properly allowed administrators, in addition to commissions.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

⇐109 (5). Procuring bond.

Mo.App. 1914. In the absence of statutory authority, executors and trustees are not entitled to reimbursement from the estate for money paid as a premium on their fidelity bonds.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

Mo.App. 1920. Laws 1917, p. 98, § 229, allowing administrators a reasonable cost for a surety company bond, does not apply where the bond was secured and the account approved by the probate court before the act was adopted, and the trial in the circuit court on appeal took place before the act became effective, though after its adoption.

In re Buck's Estate, 220 S.W. 714.

The cost of the bond of an administrator pendente lite is an expense incident to his qualification, not to administration, and he must defray such cost.

In re Buck's Estate, 220 S.W. 714.

⇐110. —— Taxes.

Mo. 1876. An administrator should not be allowed for expenditures in redeeming land from a tax sale, where the sale resulted from his negligence in failing to pay the taxes.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Taxes paid by the executor after final settlement, and which were a lien on the estate, will be allowed, where the payment was necessary to effectuate the distribution.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1887. Among the assets which came to the hands of B. as executor of decedent's estate was a note secured by a deed of trust. For five years after B.'s appointment, the land conveyed by the deed of trust was worth the full amount of the note, but it then depreciated 50 per cent. B. paid taxes on the land for several years, but took no steps to foreclose, and suffered the note to be barred by limitation. The maker of the note was insolvent during the whole period, and the land was unoccupied. The court found, on an accounting, that B. was liable for the loss sustained by depreciation of the land. *Held*, that B. should not be allowed credit for the taxes paid on the land, since, if he had done his duty and foreclosed the mortgage, it would not have been necessary to pay the taxes.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo.App. 1879. Under Wag.St. p. 95, § 12, providing that an administrator shall "collect and preserve the estate" of his decedent, an administrator has no authority to pay a special tax bill, which is a lien on the real estate.

In re Motier's Estate, 7 Mo.App. 514.

Mo.App. 1880. Executors are properly allowed credits for money paid on account of taxes, penalties, and costs on the lands of the estate, where there was no cash to pay the taxes when due and before costs accumulated.

Schoeneich v. Reed, 8 Mo.App. 356.

Mo.App. 1916. Under Rev.St.1909, § 190, V.A.M.S. § 464.010, par. 3, touching the payment of taxes by administrators, sections 190–199, §§ 464.010 et seq., relative to allowance of claims and section 230, § 465.090, relating to settlements, *held*, that taxes paid by the administratrix, which were not a charge on the estate at decedent's death, there being no order of the court placing the real estate in her charge, would not be allowed against the estate.

Graham v. Wilson, 185 S.W. 1160.

Mo.App. 1932. Where intestate is alive on January 1st, taxes for preceding year are "charge" on intestate's realty within statute requiring administrator to pay taxes which are "charge" against realty at intestate's death. Rev.St.1929, § 182, V.A.M.S. § 464.-010.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

Mo.App. 1940. On final settlement of an estate, executor was properly credited with personal property taxes, since under statute it was the duty of the executor to pay taxes without demand being presented to probate court for allowance. Mo.St.Ann. § 182, p. 108, V.A.M.S. § 464.010.

In re Flynn's Estate, 142 S.W.2d 1069.

On final settlement of decedent's estate, the fee paid to the inheritance tax appraiser was properly credited to the executor.

In re Flynn's Estate, 142 S.W.2d 1069.

⇐111. —— Counsel fees and costs.

⇐111 (1). In general.

Mo. 1843. Administrators suing as heirs at law, instead of in their representative capacity, for property belonging to the decedent's estate, will not be allowed the cost of such suit out of the estate.

Hughes v. Hughes, 8 Mo. 38.

Mo. 1897. Attorney's fees paid by an administratrix of a surviving partner, in litigation growing out of her efforts to make a settlement of the partnership estate to which there are complicated and conflicting rights, are properly charged to the estate.

Scudder v. Ames, 43 S.W. 659, 142 Mo. 187.

Mo. 1903. Under the express provisions of Rev.St.1889, § 223, V.A.M.S. § 465.090, an administrator is entitled to a credit in his settlement for a reasonable sum paid by him for legal services.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

Mo. 1934. Where efforts of administrators pendente lite were devoted to proving that trust estate was void and in violation of rule against perpetuities, administrators were not entitled to attorneys' fees payable out of trust fund.

Trautz v. Lemp, 72 S.W.2d 104, 334 Mo. 1085.

Attorneys' fees *held* not allowable out of estate to administrator of widow who sought to prove that widow was entitled to a child's share of estate which claim would have diminished estate by one-eight.

Trautz v. Lemp, 72 S.W.2d 104, 334 Mo. 1085.

Mo.App. 1884. Under Rev.St. § 14, authorizing the appointment of an administrator pendente lite, and section 229, providing that, in settlements of administrators, the court may allow all reasonable charges for funeral expenses, legal advice, and collecting and preserving the estate, and that administrators pendente lite shall receive such compensation as the probate court may deem just and proper, an administrator pendente lite is entitled to an allowance for attorney's fees in addition to his commissions.

In re Handfield's Estate, 16 Mo.App. 332.

Mo.App. 1885. A public administrator, who takes into his hands the administration of an estate without authority, and prosecutes litigation on behalf of the estate, is personally responsible for the costs of the litigation.

Lewis v. McCabe, 16 Mo.App. 398.

Mo.App. 1905. The services of an attorney for an administratrix, consisting of giving her advice, drawing leases and other legal instruments, ejecting nonpaying tenants, collecting doubtful demands due the estate, discovering assets, and investigating and adjusting disputed claims, are such as the estate is liable for, under Rev.St.1899, § 223, V.A.M.S. § 465.100, providing for allowances for legal advice and services.

Hill v. Evans, 91 S.W. 1022, 114 Mo. App. 715.

Mo.App. 1908. An executor is not entitled to credit for expenditures for attorney's fees or costs in a suit to set aside a deed of testator, prosecuted, not in behalf of the estate, but by and in behalf of testator's heirs, for their personal benefit.

In re Peters, 107 S.W. 406, 128 Mo.App. 666.

Mo.App. 1911. An attorney employed by an administrator does not forfeit his right to compensation for services rendered merely because he represents the administrator and his wife in presenting a claim in their favor against decedent's estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

Mo.App. 1913. An administrator, who acts in good faith and with ordinary prudence in employing an attorney on behalf of the estate, is entitled to have his account credited for costs he is compelled to pay for litigation, including attorney's fees, irrespective of whether the litigation results favorably to the estate.

Dooley v. Welch, 158 S.W. 454, 172 Mo. App. 528.

An administrator may properly be allowed remuneration for reasonable attorney's fees paid, where the legal services were given on behalf and for the benefit of the estate.

Mo.App. 1914. In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

Mo.App. 1915. In re Jamison's Estate, 176 S.W. 271, 190 Mo.App. 638.

Mo.App. 1927. Real estate not having come into his hands, administrator was not entitled to allowance for attorney's services therein.

Gump's Estate v. Jacobs, 292 S.W. 81, 222 Mo.App. 545.

Mo.App. 1932. Attorneys' fees are expenses of administration and, if reasonable, must be allowed.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Mo.App. 1940. In final settlement of an estate, disallowance of credit to executor of costs incurred in litigation which was not for benefit of estate was proper.

In re Flynn's Estate, 142 S.W.2d 1069.

Where, on partial settlement, executor took credit for his attorney's fees in sum of $1,000, and in proposed final settlement

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sought to take credit for an attorney's fee of $1,500, exception to such credit was properly sustained where the actual litigation was not for the benefit of the estate.

In re Flynn's Estate, 142 S.W.2d 1069.

Mo.App. 1943. Services performed by administrator's attorney in investigating title to real estate, which administrator had been directed to sell for purpose of paying debts, with a view to filing suit to quiet title, was not chargeable against money realized from sale of real estate, since perfecting title would fall upon heirs or the purchaser from administrator. Mo.R.S.A. §§ 141, 220, V.A.M.S. §§ 463.170, 465.100.

In re Claus' Estate, 167 S.W.2d 372.

Estate of deceased, which is required to sell real estate to pay debts, should not be burdened with expense of an examination of the title, by both title company and administrator's attorney. Mo.R.S.A. §§ 141, 220, V.A.M.S. §§ 463.170, 465.100.

In re Claus' Estate, 167 S.W.2d 372.

Mo.App. 1943. Such items as attorney's fees, probate court costs, printing, appraisal fees, administrator's fees and expenses, and abstract fees constitute "costs of administration".

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

⇐111 (2). Procuring appointment as administrator.

For cases from other jurisdictions, see other Key Number Digests.

⇐111(3). Probate and contest of will.

Mo. 1897. Though an executor named in a will is entitled to reimbursement out of the estate, under Rev.St.1889, § 222, V.A.M.S. § 465.100, for expenses of probate, including reasonable charges for legal advice and services, yet where certain residuary legatees, after the formal probate of such will, brought suit to contest its validity, under sections 8888 and 8889, §§ 468.580, 468.590, as against the devisees, one of whom was such executor thereof, attorney's fees and other expenses incurred in defending such suit should not be allowed as a charge against the estate, but should be borne by the parties interested in the result.

In re Soulard's Estate, 43 S.W. 617, 141 Mo. 642.

Mo. 1910. Expenses incurred by an executor in unsuccessfully assailing the will by raising an issue of ademption is not a proper expenditure by him as executor, and, in the absence of evidence of an express agreement on the part of the legatees to reimburse him for the costs, the estate is not liable therefor.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

Mo.App. 1902. An executor is not entitled to credit, in his final settlement, for costs and expenses incurred in a successful defense of a proceeding by one legatee against other legatees to contest the validity of the will.

In re Fry's Estate, 70 S.W. 172, 96 Mo. App. 208.

⇐111 (4). Resisting claims against estate.

Mo.App. 1932. When administrator and attorney act in good faith and in exercise of ordinary prudence in defending suit by one claiming to own estate, matter is for benefit of estate, regardless of result.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

⇐111(5). Services that should have been performed by executor or administrator.

Mo.App. 1943. When an order is made by the probate court authorizing administrator to sell real estate for the purpose of paying debts, it is contemplated that administrator will himself make the sale and not that he employ someone else to perform the duty for him, and if agent is employed, such agent cannot be paid out of funds belonging to the estate. Mo.R.S.A. § 141, V.A.M.S. § 463.170.

In re Claus' Estate, 167 S.W.2d 372.

The statute authorizing administrator to employ an attorney does not contemplate that administrator should delegate to the attorney all the clerical work and such services as could be performed by administrator and charge the estate therefor as "legal advice and service". Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Claus' Estate, 167 S.W.2d 372.

Services performed by attorney for administrator consisting of proceedings to discover assets, looking through old files and papers of deceased for money or property and other services which administrator could have performed himself could not be classed as "legal advice" chargeable against money arising from sale of real estate to pay debts. Mo.R.S.A. §§ 141, 220, V.A.M.S. §§ 463.170, 465.100.

In re Claus' Estate, 167 S.W.2d 372.

⇐111 (6). Amount of fees.

Mo. 1941. In determining amount to be allowed to attorneys representing two of several estates claiming interests in large trust

estate, court could consider fact that another attorney assumed principal role in principal litigation, amount of time and labor expended, amount involved, legal questions in controversy, amount allowed to such other attorney by federal court, amount saved by estate in inheritance taxes and the benefits to estate resulting from litigation.

In re Franz' Estate, 145 S.W.2d 400, 346 Mo. 1149.

$40,000 was required to be assessed against two estates for attorneys' fees for services rendered in determining interests in trust estate and saving estates large sums of inheritance taxes under evidence.

In re Franz, Estate, 145 S.W.2d 400, 346 Mo. 1149.

Mo.App. 1905. Decedent left an estate consisting of about $7,000 in personalty and three large farms, besides several pieces of city property. He owed debts aggregating $9,000, and numerous debts of various degrees of collectibility were owing to him. The real estate was located in several different counties. His widow, who was appointed administratrix, had not been apprised of his business matters and had scant knowledge of his affairs. She employed an attorney, who for a period of about three years rendered services, consisting of giving advice to the administratrix, drawing leases and other legal instruments, ejecting nonpaying tenants, collecting doubtful demands due the estate, discovering assets, and investigating and adjusting disputed claims. *Held*, that an allowance of a fee of $400 paid to the attorney was not excessive.

Hill v. Evans, 91 S.W. 1022, 114 Mo.App. 715.

Mo.App. 1932. Administratrix entitled to defend litigation at expense of estate was entitled to credit for procurement of bill of exceptions and printing bills for record and briefs.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Administrator is entitled to reasonable allowance for legal services rendered in defense of final settlement.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

⇐111 (7). Separate counsel to coexecutors or coadministrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐111 (8). Legal proceedings made necessary by acts of executor or administrator.

Mo.App. 1908. The defense, interposed by an executor to the order for payment to a legatee of her legacy, that it should be applied on the payment of the consideration of a deed made by testator to her husband alone, is void of reasonableness; so that the executor should not have credit for interest he was required to pay the legatee because of his appeal, or for costs or attorney's fees therein.

In re Peters, 107 S.W. 406, 128 Mo.App. 666.

⇐111 (9). Individual interest of executor or administrator in proceeding.

Mo. 1910. Expenses incurred by an executor in a suit against him for the recovery of real estate in his possession in his capacity as an individual is not an expenditure required by him as executor, and the estate is not liable therefor.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

Mo.App. 1914. An administrator cannot, as a general rule, be allowed counsel fees for services in defense of his own personal interest, or where the litigation is in reality between the beneficiaries and not for the benefit of the estate as a whole.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

The court on final settlement of an administrator should, in determining the question of allowance of counsel fees, distinguish between counsel fees chargeable against the estate and those for which the administrator is personally liable.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

Mo.App. 1927. Public administrator *held* not entitled to credit for legal services rendered by attorney in advocating adverse claim. Rev.St.1919, §§ 220, 295, V.A.M.S. §§ 461.810, 465.100.

Gump's Estate v. Jacobs, 292 S.W. 81, 222 Mo.App. 545.

⇐112-113.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐114. Estoppel.

Mo. 1881. Under Wag.St. p. 89, § 40, providing that an executor may transfer choses in action belonging to the estate only by assignment in discharge of claims against the estate, an executor who pledges notes due the estate to secure his own note as executor

is not estopped from suing to recover the collateral.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo. 1942. Where sole heir of assignee concurred in administrator's continuation of deceased's business for performance of pending contracts, and did not interpose objections in probate court, heir's assignee was to a certain extent "estopped" from thereafter complaining of continuation of business.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1936. Son who was executor of father's estate *held* estopped to deny right of mother to maintain suit on unpaid purchase-money note given by son to father for purchase of realty, where note was lost and not accounted for while son was executor, as against contention that personal property under will passed to son as executor, and mother who was legatee could not maintain suit.

Nord v. Nord, 91 S.W.2d 223.

⇐115. Individual interest in transactions.

Mo. 1870. An executor has no claim against an estate for the face of claims which he purchases at a discount. He may so purchase, but not for himself; and all his transactions in that regard should be treated as for the estate, whose agent and servant he is.

Hull v. Voorhis, 45 Mo. 555.

Mo. 1874. Where a sale of land under a deed of trust given by the decedent appears in fact to have been prompted by the administrator, although nominally made by the trustee named in the deed, equity will regard the purchase of the land by the administrator as made in trust for the benefit of the estate.

Harper v. Mansfield, 58 Mo. 17.

The statute requiring the appraisement of land held by an administrator before he can purchase the same does not apply to his purchase of land sold under a deed of trust given by his intestate.

Harper v. Mansfield, 58 Mo. 17.

Mo. 1881. An executor's pledge of property of the estate to secure the personal debt of the executor is a conversion of the property, for which the sureties on the administration bond are liable.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo. 1881. Where a note was payable to two administrators, and one of them accounted to the estate for the full amount of the note, and final settlement was made and the administrator discharged, the administrator who accounted for the amount of the note, and to whom all the interest thereon of the other administrator had been assigned, was the owner of the note, which was devested of any fiduciary quality, and he had a right to maintain an action thereon.

Smith v. Gregory, 75 Mo. 121.

Mo. 1884. As an administrator has no duty to perform, with respect to real estate of his decedent, except to lease the land under the direction of the probate court, and to recover the rents and the possession of the land thus leased, as authorized by Rev. St.1879, § 129, and has only, under section 149, the power to sell the land for the payment of debts, an administrator may purchase the real estate of his decedent at a foreclosure sale in the circuit court; section 166, prohibiting an administrator from purchasing the land of his decedent, having reference only to probate sales.

Dillinger v. Kelley, 84 Mo. 561.

Mo. 1900. The administrator of the estate of the grantor in a deed of trust to secure debts is not prohibited from purchasing the land in his individual capacity at the trustee's sale.

Markwell v. Markwell, 57 S.W. 1078, 157 Mo. 326.

Mo. 1907. Where executrix, to whom an order of sale of a tract of land of the estate to pay debts was granted, under which the land might have been sold for enough to pay the mortgage debt thereon with the debts at large of the estate and costs of administration, and who purposely delayed making a sale until the land was sold under a trust deed, with the intent of becoming the purchaser, did become such purchaser for a sum sufficient to pay only the mortgage debt and costs, which was paid from her own funds, she will be devested of the title so acquired, and the same will be revested in the estate subject to subrogation in her favor to the rights of the cestui que trust under the trust deed.

Stitt v. Stitt, 103 S.W. 547, 205 Mo. 155.

Mo.App. 1880. An administrator obtained an order for the sale of certain real estate of deceased which was incumbered by a trust deed. The existence of the trust deed was known to the administrator and to the probate court which ordered the sale, but was not noticed either in the order of sale, or advertisement, or in the deed. In his ensuing annual settlement, the administrator charged himself with the money received on the sale, and took credit for the notes, prin-

cipal and interest, secured by the deed of trust on the tract sold. This settlement was approved by the probate court. *Held* that, though it might have been more regular for the administrator to proceed to sell the equity of redemption, under Gen.St.1865, § 8, instead of selling the land itself, he could not be charged on his official bond as for a devastavit, because of the payment by him of the trust deed from the proceeds of the sale.

State, to Use of Lewis, v. Schleiffarth, 9 Mo.App. 431.

Mo.App. 1889. While it was improper for an administrator to sell the corn crop belonging to the estate to himself without order or approval of the court, yet where it appears from the evidence, as found by the judgment of the probate court and the circuit court, that the administrator charged himself up with every bushel and at the highest market price, the Court of Appeals will not reverse the judgment of the circuit court, approving and confirming the settlement of the administrator.

In re Phillips, 38 Mo.App. 509.

Mo.App. 1890. A legatee, who was also the executor of an estate, gave to a stranger a mortgage on personal property of the estate to secure an individual debt. *Held*, that it could not be questioned by the mortgagee for want of title in the mortgagor, for, being legatee in possession, he had an inchoate title, and none but persons interested in the estate could dispute his right as executor to give the mortgage.

Boeger v. Langenberg, 42 Mo.App. 7.

⇐116. Fraud.

Mo. 1909. The widow, to whom a life estate in her husband's property had been left with power to sell such as was necessary for her comfort and support, was appointed her husband's executrix, and within three months after his death requested a quitclaim deed from the remaindermen. Being unable to secure it, she instituted proceedings to which the remaindermen were parties, and acquired a decree authorizing a sale. She thereafter conveyed other of the property to defendants in consideration of their agreement to care for and support her during the balance of her life. As executrix she made a final settlement which showed a balance of $802.20 in her favor and obtained a decree settling her account to which the remaindermen made no objection. *Held* insufficient to show a fraudulent purpose on her part to waste the estate and defraud the remaindermen.

Griffin v. Nicholas, 123 S.W. 1063, 224 Mo. 275.

Mo.App. 1885. The administrator of a deceased stockholder, who refused to include the stock in the inventory on the ground that it would become a liability of the estate, was not personally liable to the creditors of the corporation on the ground that his act was fraudulent.

Simmons v. Ellis, 17 Mo.App. 470.

Mo.App. 1887. An administrator not being authorized to make representations as to the property of the estate sold by him, the estate cannot be held liable for any misrepresentations so made.

Richardson v. Palmer, 24 Mo.App. 480.

Mo.App. 1889. In an action against administrators for false representations as to the quality of property purchased by plaintiff at the administrator's sale, it appeared that an agent of defendants had made the alleged representations, and that plaintiff knew that defendant had made the sale as administrator, and that he had previously warned him that he had no right to warrant anything concerning any of the cattle sold except their title and pedigree. *Held*, that it appeared that plaintiff did not rely upon the representations made to him by the agent, and hence was not entitled to recover.

Richardson v. Palmer, 36 Mo.App. 88.

⇐117. Waste, conversion, or embezzlement of assets.

Mo. 1878. Defendant owed certain sums to an administrator, who held certificates of deposit therefor, and, after collecting the amount and surrendering the certificates, the administrator placed a portion of said amount on deposit to his individual credit with defendant. *Held*, that this was a conversion, for which the administrator and his bondsmen were liable, and defendant was not liable therefor, as for trust funds, to the successor in office of said administrator.

Brooks v. Mastin, 69 Mo. 58.

Mo. 1881. The pledging by an executor to secure his individual debt of notes due the estate is an act of conversion as against the estate.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo.App. 1912. Since one having a half interest in notes distributed to heirs under an order of distribution became a tenant in common with the distributees, the mere act of the administrator in turning over the notes to them was not a conversion thereof.

Dewees v. Yost, 143 S.W. 72, 161 Mo. App. 10.

Mo.App. 1926. Executor not guilty of conversion in making inventory and appraisement of household goods in testator's possession.

Welch v. Diehl's Estate, 278 S.W. 1057.

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118. Loss of assets.

Mo. 1851. An administrator is entitled to credit for notes lost without his negligence.

Stong v. Wilkson, 14 Mo. 116.

Mo. 1869. Executors and administrators stand in the position of trustees of those interested in the estates upon which they administer, and are liable only for want of due care and skill; hence they cannot in equity be held liable for loss of the trust funds by robbery.

State ex rel. Townshend v. Meagher, 44 Mo. 356, 100 Am.Dec. 298.

Mo. 1873. An administrator is not an insurer of the property of the decedent in any sense of the word. Thus, where he was robbed of certain moneys belonging to the estate, *held* that, in the absence of any evidence showing negligence on his part, he was not personally liable for the loss.

Fudge v. Durn, 51 Mo. 264.

Where an administrator in Missouri came into possession of certain money in the fall of 1860, he was not liable for the sum of $400 kept in his house as the money of the estate, and taken from him during the early part of the war by some raiders from Kansas.

Fudge v. Durn, 51 Mo. 264.

Mo. 1876. Where an administrator manages the property of the estate in a manner unauthorized by law, but from such management a profit accrues to the estate, he should not be charged with a loss as to a small item without a corresponding credit for the greater benefit.

Merritt's Estate v. Merritt, 62 Mo. 150.

Mo. 1876. An administrator is entitled to credit for the value of slaves emancipated.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1887. The law holds an executor or administrator responsible for the want of due care in protecting the property of the estate from theft or loss, and the measure of the care and skill which they are required to use is that which a prudent man exercises in the direction of his own affairs.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo.App. 1888. Under the particular facts and circumstances, *held*, that an executor was not liable for the loss of money due to the failure of a bank in which the money was deposited, notwithstanding it was deposited in his own name; there being evidence to show that there was no intention on his part to have the money placed to his individual credit, and he did not know at the time that it was so done.

Atterberry v. McDuffee, 31 Mo.App. 603.

Mo.App. 1896. Where the evidence shows that an administrator knowingly and intentionally deposited funds of the estate in his own name, and caused the certificate of deposit to be made out to him personally, thereby asserting an individual ownership of the funds, creating the relation of creditor and debtor between the bank and himself, he will be held liable for the money in case of the failure of the bank, notwithstanding a conversation between him and the cashier, which was merely to the effect that the funds belonged to an estate of which he was administrator, and that he wanted it to draw interest, and would need it to make his final settlement.

In re Horner's Estate, 66 Mo.App. 531.

While the law only holds executors and administrators to that measure of diligence and prudence which prudent men of discretion and intelligence employ in their own affairs, yet it forbids them to take title to themselves for the purpose of speculating in the assets; and, where they do so take title and losses result, it is no excuse for them to say that the loss would have happened all the same if title had been taken in their representative capacities.

In re Horner's Estate, 66 Mo.App. 531.

Mo.App. 1905. On exceptions to the report of an administratrix, evidence examined, and *held* sufficient to sustain a finding that the administratrix acted with due care and for the benefit of the estate in the employment of a certain person to act as agent in handling some of the property, so that she was not chargeable with a loss sustained by the estate as the result of the agent's unauthorized and wrongful act.

Hill v. Evans, 91 S.W. 1022, 114 Mo.App. 715.

An administratrix stands in the position of a trustee to those interested in the estate, and is liable only for the want of due care and skill; and the measure of due care and skill is that which prudent persons exercise in the direction and management of their own affairs.

Hill v. Evans, 91 S.W. 1022, 114 Mo.App. 715.

Mo.App. 1917. If administrator accepted less than face value of note in order to secure settlement of damage suit against him individually by maker for malicious prosecution in collection of note, he should not be allowed credit on his final accounting for uncollected portion of note.

Young v. Ray, 193 S.W. 608.

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App. 1922. The administrator of an estate cannot be held liable for the value of corporate stock as fixed either by the inventory or the appraisement where he retained possession of the certificates of stock belonging to the estate, and offered to turn them over to his successor, though in the meantime the stock had become worthless.

Mississippi Valley Trust Co. v. Taylor, 238 S.W. 558.

⇐119. Torts.

D.C.Mo. 1950. If Missouri partnership was being continued as alleged under probate court order after death of a partner prior to automobile collision, liability of partnership for injuries resulting from automobile collision could be enforced against estate of deceased partner as well as against surviving partner, with liability of estate probably being limited to assets of partnership belonging to estate of deceased partner. Mo.R.S.A. § 5575, V.A.M.S. § 350.290 note.

Wright v. R. & L. Market, 9 F.R.D. 559.

Mo.App. 1912. An administratrix, in accordance with an order of the probate court made under Rev.St.1909, § 139, V.A.M.S. § 462.280, providing that no administrator except one acting under an order of the probate court shall rent or control real estate of deceased, rented three store buildings which belonged to the intestate for the payment of his debts. Upon the roof of these buildings there was a water tank, which was for the protection of them all and was not leased to any particular tenant. *Held* that, despite section 140, § 462.300, providing that, when any realty of a decedent needs repairs, the court may on the application of any person interested order the administrator to make the necessary repairs whenever it can be done without prejudice to creditors, the administratrix, having taken control of the premises and reserved the water tank, was individually liable for her failure to repair the water tank, which she knew was unsafe, even though no order of the probate court had been made.

T. L. Horn Trunk Co. v. Delano, 142 S. W. 770, 162 Mo.App. 402.

⇐120. Administrators de bonis non.

⇐120(1). Powers of successor of administrator.

Mo. 1842. An administrator de bonis non is entitled to specific property which can be identified as belonging to his estate; but, as to property which cannot be so identified, he is entitled to no preference to other creditors of the deceased administrator of the same class.

Gamble v. Hamilton, 7 Mo. 469.

Mo. 1851. If the original administrator so changes the property in the effects of the deceased that it vests in him in his individual capacity, such effects will go to his legal representative, and not to the administrator de bonis non of his intestate.

Harney v. Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

If the cause of action be such that the original administrator might have sued in his own name, the right of action on his death devolves on the administrator de bonis non, and not upon the representative of the original administrator.

Harney v. Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

Mo. 1851. If the domicile of an intestate at the time of his death was in a foreign state, and administration upon his estate here has been finally closed, and the residue of the assets transferred and carried into the foreign administration, an administrator de bonis non appointed here cannot recover, though brought again into this state.

Spraddling v. Pipkin, 15 Mo. 118.

Mo. 1852. The principle of the common law which entitled an administrator de bonis non to those goods only which remained in specie and not administered on by the first administrator is abolished by the system of administration introduced in Missouri.

State, to Use of Blanton's Adm'r, v. Hunter, 15 Mo. 490.

Mo. 1872. Under the administration act, Wag.St. p. 81, an administrator de bonis non is entitled to summary process against his predecessor to compel the surrender of the property belonging to the estate in the hands of the latter. It is optional with him to pursue this course or to bring his action on his predecessor's bond.

Wickham v. Page, 49 Mo. 526.

Mo. 1878. An administrator de bonis non cannot sue parties with whom the intestate has made a deposit for the balance of said deposit, where the first administrator has received a portion of the deposit and surrendered the certificates of deposit.

Brooks v. Mastin, 69 Mo. 58.

Mo. 1882. In an action by an administrator de bonis non against his predecessor to recover assets of the estate not turned over, the petition need only allege plaintiff's appointment and the order of the county court that such predecessor turn over the property, without alleging the facts on which such order was based.

State ex rel. Guenther v. King, 76 Mo. 510.

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Mo. 1883. An administrator de bonis non may maintain an action to recover the assets in the hands of his predecessor, though all the debts have been paid and an order of distribution has been made.

Morehouse v. Ware, 78 Mo. 100.

Mo.App. 1886. Where an administrator sold property of the estate, taking the purchaser's note in payment, and subsequently in his personal capacity repurchased the property and surrendered the note in payment therefor, no title to the note passed, and the administrator de bonis non was entitled to sue the maker thereon.

Cowgill v. Linville, 20 Mo.App. 138.

Mo.App. 1920. Where an administrator failed in his trust by appropriating, as a partner with deceased, certain assets of the estate, and resigned, an administrator de bonis non, subsequently appointed, should collect such assets for the estate; the former administrator and his bondsmen being liable to the estate.

Chapin's Estate v. Long, 224 S.W. 1012, 205 Mo.App. 414.

Mo.App. 1924. A pending settlement in the Probate Court, under Rev.St.1919, §§ 47, 48, V.A.M.S. §§ 461.550, 461.560, by a deposed administrator, does not authorize abatement of his successor's action against a bank for refusal to surrender government bonds deposited by the former administrator, though the probate court could compel delivery of the bonds to plaintiff when the settlement was completed and approved. Rev.St.1919, § 54, V.A.M.S. § 461.620.

Williams v. People's Bank of Springfield, 257 S.W. 192.

A pending settlement by a deposed administrator in the probate court *held* no bar to his successor's action for money deposited in a bank by him as administrator, though part of it belonged to others; the Probate Court being concerned only with how much of the estate's funds the administrator received.

Williams v. People's Bank of Springfield, 257 S.W. 192.

That a new administrator appeared in the probate court and filed exceptions to the settlement of the outgoing administrator is immaterial as respects his right to sue for possession of property belonging to the estate.

Williams v. People's Bank of Springfield, 257 S.W. 192.

Mo.App. 1939. Where widow of beneficiary of war risk policy had received all of proceeds of policy that she was entitled to as widow and heir of deceased husband, administrator de bonis non of soldier's estate was required to settle estate by paying expenses of administration, and by distributing balance to collateral heirs of beneficiary. 38 U.S.C.A. § 514.

State ex rel. Lankford v. Fidelity & Deposit Co. of Maryland, 123 S.W.2d 552, 232 Mo.App. 979.

Mo.App. 1941. A person who became administrator de bonis non of a deceased wife's estate could file a motion in probate court to vacate a void judgment of the court declaring that a trust existed in personalty held by wife for husband's benefit where record showed that such person, although not administrator when motion was filed, became a party to cause before trial in Probate Court. Rev.St.1939, § 47, Mo.St.Ann. § 47, p. 38, V.A.M.S. § 461.540.

In re Main's Estate, 152 S.W.2d 696, 236 Mo.App. 88, transferred 146 S.W.2d 597.

⇐120(2). Powers and liabilities of successor of executor in general.

Mo. 1884. When an executor resigns or has his letters revoked, he is bound to account for and turn over to the administrator d. b. n. c. t. a. all the property of the estate in his hands, and after so doing is not liable to a creditor of the estate for failure to pay a claim which he was previously ordered to pay.

State ex rel. Crane v. Heinrichs, 82 Mo. 542.

App. 1882. All acts done by an administrator de bonis non prior to his displacement by the reinstatement of the executor are valid and binding.

McManus v. McDowell, 11 Mo.App. 436.

⇐120(3). Power of sale under will.

Mo. 1901. Where a will positively directs the executor to sell testator's realty, the power of sale is not personal, but passes to a succeeding administrator on the removal or resignation of the excutor named in the will.

Francisco v. Wingfield, 61 S.W. 842, 161 Mo. 542.

Mo. 1933. Power to sell realty under will absolutely requiring executor to sell on happening of certain contingency is not personal trust, but inheres in office of executor and may be exercised by administrator de bonis non with will annexed, notwithstanding discretion as to exact time, terms, and manner of sale. Rev.St.1929, § 133, V.A.M.S. § 463.140.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539,

226 Mo.App. 688, transferred 39 S.W.2d 367.

Land, directed to be sold "to best advantage" at widow's death by will requiring equal division of proceeds among testator's children, *held* subject to sale by administrator de bonis non with will annexed; partition sale being contrary to will. Rev.St. 1929, § 133, V.A.M.S. § 463.140.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W.2d 367.

Mo.App. 1913. A will which directs the executor to sell real estate and divide the proceeds on the happening of a contingency, and which empowers him to make deeds, does not repose in him any personal trust, but a sale must be made on the happening of the contingency, and the power to sell inheres in the office and may be exercised by the administrator de bonis non.

Cannon v. Unknown Heirs of Curtis, 157 S.W. 860, 175 Mo.App. 84.

Mo.App. 1931. Testamentary power of sale, inhering in office of executrix, not having been executed during executrix' incumbency, may be executed by successors. Rev.St.1929, § 133, V.A.M.S. § 463.140.

Long v. Long, 38 S.W.2d 288.

⇐121. Administrators with will annexed.

⇐121 (1). In general.

For cases from other jurisdictions, see other Key Number Digests.

⇐121(2). Power of sale under will.

Mo. 1933. Testamentary provision for sale of land at death of testator's widow created proper executorial duty, which could be exercised by administrator with will annexed. Rev.St.1929, § 133, V.A.M.S. § 463.-140.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W.2d 367.

⇐122. Temporary or special administrators.

⇐122 (1). Authority and duty in general.

Mo. 1903. Under Rev.St.1899, § 13, V. A.M.S. §§ 461.080, 461.090, declaring that, if the validity of a will be contested, letters of administration shall be granted during the time of such contest to some other person who shall take charge of the property, etc., an administrator pendente lite during such contest has no right to possession of the real estate owned by decedent at the time of his death, unless the probate court so orders, or the property is needed to pay debts.

Union Trust Co. v. Soderer, 72 S.W. 499, 171 Mo. 675, distinguishing In re Soulard's Estate, 43 S.W. 617, 141 Mo. 642.

Mo.App. 1921. An administrator pendente lite, whose duties under Rev.St.1919, § 13, V.A.M.S. §§ 461.080, 461.090, are to take charge of the property and administer it according to law under the direction of the court, is not, properly speaking, a representative of the deceased, but is an officer of the court to see that no detriment comes to the estate during the pendency of litigation.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

⇐122(2). Collection and disposition of assets.

Mo. 1897. Under Rev.St.1889, § 13, V.A. M.S. §§ 461.080, 461.090, requiring the temporary administrator, pending the contest of a will, to "take charge of the property, and administer the same according to law, under the direction of the court," such officer was authorized to take charge of the real estate the title to which was in controversy, and had the right to collect the rents, and was entitled to the commission allowed by law on the sums collected.

In re Soulard's Estate, 43 S.W. 617, 141 Mo. 642.

Mo. 1921. Where a son gave a promissory note to his father, and was by father's will made executor, but on institution of will contest an administrator pendente lite was appointed, it was both a prerogative and duty of the administrator to collect the note.

Watts v. Mayes, 232 S.W. 122.

Mo. 1922. The probate court is without power to authorize the turning over of the assets of the estate to a temporary administrator before the temporary administrator has given the statutory bond in double the amount of the assets, and an order to that effect was void. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

The executor appointed by a will could rightfully refuse to turn over the assets of the estate to an administrator appointed pending a suit to contest the will until that administrator had qualified by giving the bond required by law, and is not liable in tort for the amount of commissions which the temporary administrator would have received if the assets had been turned over. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

For later cases see same Topic and Key Number in Pocket Parts

⇐122 (3). Expenditures.

Mo. 1878. A temporary administrator, appointed pending a contest of the will, is entitled to be allowed his reasonable charges for leasing real estate, legal advice and service, and collecting and preserving the estate.

Hawkins v. Cunningham, 67 Mo. 415.

Mo.App. 1921. The fees of attorneys who represented an administrator pendente lite in resisting an appeal from an order suspending the letters testamentary, issued to the executor pending the will contest, and mandamus proceedings to compel the allowance of such appeal, were not incurred for the benefit of the estate, and cannot be charged against it.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

An administrator pendente lite cannot expend funds coming into his possession as such in maintaining his right to the appointment.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

⇐123. Coexecutors and coadministrators.

Mo.App. 1911. Though one of two administrators did not join his coadministrator in assigning a note executed to the administrators as such, the signing of his name to the assignment by the other administrator was ratified, where with knowledge of the assignment, the nonsigning administrator used the proceeds in the final settlement of the estate, with knowledge of the assignment.

Vandeventer v. Florida Savings Bank, 141 S.W. 900, 162 Mo.App. 34.

⇐124. —— Joint or several authority.

Mo. 1868. No partnership can exist in the office of administrator.

Seeley's Adm'r v. Beck, 42 Mo. 143.

Mo. 1875. A conveyance by part of the executors named in a will may be made where the others refuse to qualify.

Phillips v. Stewart, 59 Mo. 491.

Mo. 1913. Where only one of two executors joined in conveying land in accordance with an order of sale by the court of ordinary the conveyance was inoperative and did not pass title.

Armor v. Frey, 161 S.W. 829, 253 Mo. 447.

Mo.App. 1934. Executor has no power to sign name of coexecutor, and cannot delegate such power to coexecutor.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

Deed to real estate executed by one of two executors is ineffective, since executors must act jointly.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

In suit to enforce agreement to accept $3,000 in satisfaction of debt of $4,000 due estate where there was no allegation or proof that executor negotiating agreement acted in individual capacity, coexecutor would be deemed to have acquiesced in agreement, rendering it enforceable as made by joint action of executors.

Wayland v. Pendleton, 73 S.W.2d 288, reversed 85 S.W.2d 492, 337 Mo. 190.

⇐125-127.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐128. Representatives of deceased executors or administrators.

Mo. 1851. If the cause of action be such that the original administrator might have sued in his own name, the right of action on his death devolves on the administrator de bonis non, and not upon the representative of the original administrator.

Harney v. Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

If the original administrator so changes the property in the effects of the deceased that it vests in him in his individual capacity, such effects will go to his legal representative, and not to the administrator de bonis non of his intestate.

Harney v. Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

Mo. 1852. The representatives of a deceased administrator are liable to the sureties in the administration bond for what they may have had to pay on account of the defalcations of a coadministrator after he became surviving administrator, and after he received, by order of court, from the executor of the deceased administrator, all the effects the latter had received.

Dobyns v. McGovern, 15 Mo. 662.

Mo. 1859. Where a promissory note is made to an administrator in his representative character, and he dies, a suit thereon may be properly brought in the name of his executor.

Cook's Ex'r v. Holmes, 29 Mo. 61, 77 Am. Dec. 548.

Mo. 1872. Under the administration act, Wag.St. p. 81, an administrator de bonis non is entitled to summary process against his predecessor to compel the surrender of

the property belonging to the estate in the hands of the latter. It is optional with him to pursue this course or to bring his action on his predecessor's bond.

Wickham v. Page, 49 Mo. 526.

Mo. 1887. On the death of an executor, the property of the estate remaining in his hands does not go to his representatives, but goes to the administrator de bonis non.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo. 1902. Where the administrator of F. also succeeds his decedent, who was administrator de bonis non of another estate, and as administrator of F.'s estate settles the administration accounts of his decedent with the estate of which the latter was administrator, such settlement is not subject to review on final settlement of his accounts as administrator of F.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo. 1908. Under Rev.St.1899, § 46, Ann. St.1906, p. 350, V.A.M.S. § 461.540, providing that, if all the executors or administrators of an estate die or resign or their letters be revoked, in cases not otherwise provided for, letters of administration of the goods remaining unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained, etc., the estate of a testator is not, on his executor's death, represented by the executor's executor.

State ex rel. Karrenbrock v. Mississippi Valley Trust Co., 108 S.W. 97, 209 Mo. 472.

(B) REAL PROPERTY AND INTERESTS THEREIN.

⇐129. Title and authority in general.

⇐129(1). In general.

Mo. 1880. An executor has no power to dedicate land of the estate for use as a public street, in the absence of authority therefor in the will and decree of the court having jurisdiction in the matter.

Kaime v. Harty, 73 Mo. 316, reversing 4 Mo.App. 357.

Mo. 1887. The law makes it the duty of the executor to inventory all the real as well as the personal property, and under the order of the probate court he may lease the real estate, collect the rents, prosecute actions for the recovery of possession, discharge mortgages and other liens, and deliver the property to those entitled thereto when not needed for the payment of debts. Rev. St. §§ 70, 129, 130, 143.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1903. It is essential to the jurisdiction of the probate court, in proceedings for the direction of an administrator to take charge of the real estate of his intestate, that the record show that the order to take possession of or to sell the land is based on a showing that it is needed to pay debts. An order of the probate court to an administrator to take charge of real estate, not based on such a showing, is of no validity.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

Rev.St.1890, § 130, V.A.M.S. § 462.280, prohibits an administrator from controlling the real estate of the decedent, unless the probate court shall be satisfied that it is necessary to rent the estate for the payment of its debts. Section 131, § 462.300, authorizes repairs on houses in the possession of the administrator. Sections 100, 101, §§ 462.100, 462.200, authorize the employment of labor to preserve the estate. A probate court directed an administrator to complete buildings commenced by the intestate in his lifetime, and to take charge of the intestate's improved real estate, and to insure the buildings thereon. There was no showing that the personal estate of the intestate was insufficient to pay the debts. *Held*, that the orders of the court were void, and the sums paid by the administrator to complete the buildings, to pay taxes, insurance, and repairs on the real estate could not be allowed in his settlement as credits, and the rents accruing after decedent's death collected by him could not be charged against him.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

An administrator cannot lawfully take hold of the real estate until thereto ordered by the probate court, and he cannot take hold of it, even when the probate court so orders, unless the order is founded on the fact that the real estate is needed in the administration for the payment of debts.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

Mo. 1903. A bill to declare a resulting trust in land to the extent of the money contributed thereto by defendant's deceased wife was properly brought by the wife's heirs, and not by her administrator.

Johnston v. Johnston, 73 S.W. 202, 173 Mo. 91, 61 L.R.A. 166, 96 Am.St.Rep. 486.

Mo. 1922. As title passes direct to heirs, an executor's rights to the realty are acquired only on order of the court, either to sell or lease for the payment of debts.

In re Dildine's Estate, 239 S.W. 112, 293 Mo. 393.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1924. Where probate court's original order authorizing executor to take charge of decedent's real estate had expired, when second appointment of an administrator pending the contest of decedent's will was made, such administrator acquired no power over decedent's realty under the original order authorizing executor to take charge of same.

State ex rel. Hampe v. Ittner, 263 S.W. 158, 304 Mo. 135.

Mo. 1924. Relator as administrator does not represent heirs and devisees of deceased, and is not in privity with them, and does not represent them as trustee, in absence of showing of possession by him of realty, under court's order to subject it to payment of debts.

State ex rel. Buder v. Brand, 265 S.W. 989, 305 Mo. 321.

Mo.App. 1902. Where an administrator has not been ordered by the court to take charge of the real estate of a decedent, he cannot take credit for the expense for surveying a line between the property of deceased and that of an adjoining proprietor.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

⇐129 (2). Actions for trespass and waste.

Mo.App. 1912. Under Rev.St.1909, §§ 7914, 7915, V.A.M.S. §§ 537.430, 537.440, which are declaratory of the common law and give the heir or reversioner a right of action for waste, an administrator has no action therefor.

Mize v. Burnett, 145 S.W. 150, 162 Mo. App. 441.

Mo.App. 1938. Under will devising realty on which growing corn crop was located to testator's three sisters and heirs of fourth sister, executrix had no right to growing corn crop, and hence had no right to maintain suit for conversion of crop by widow who went into possession of land on death of testator after renouncing will and electing to take child's share, in absence of showing of statutory authority of executrix to take charge of realty under order of probate court. Mo.St. Ann. §§ 17, 37, pp. 18, 25; c. 1, art. 6, p. 79 et seq., V.A.M.S. §§ 461.180, 461.250.

Blum v. Frost, 116 S.W.2d 541, 234 Mo. App. 695.

⇐129 (3). Actions to quiet or remove cloud from title.

Mo. 1897. An administrator cannot sue to set aside a sheriff's sale under foreclosure, on the ground of fraud in the sale.

Thorp v. Miller, 38 S.W. 929, 137 Mo. 231.

Mo. 1927. As regards probate court's jurisdiction, neither administrator nor heirs may impeach conveyance of intestate for fraud as to creditors.

State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968, affirming in part and reversing in part 262 S.W. 433.

Administrator may not maintain equitable action as representative of creditors.

State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968, affirming in part and reversing in part 262 S.W. 433.

Mo. 1944. The personal representatives, heirs, and successors of deceased purchaser of land, conveyed at his request to his brother and sister-in-law by vendor on payment of balance of purchase price by sister-in-law's father, were not entitled to cancellation of conveyance as fraudulent and restoration of land to decedent's estate, as conveyance, though fraudulent, was valid as against purchaser and his privies in estate.

Biondo v. Biondo, 179 S.W.2d 734.

Mo. 1944. In action against surviving spouse and administratrix of the estate of deceased grantor to set aside as fraudulent a conveyance of land and transfer of personal property, petition alleging inventory value of estate personal property in excess of plaintiff's claim did not show that plaintiff had an adequate remedy at law in that the personal assets were sufficient to pay claim, where petition further alleged that inventory was false, that defendant had secured preferential allowances, that there were other demands and that the estate was insolvent. Mo.R.S.A. § 3507, V.A.M.S. § 428.020.

Herriman v. Creason, 181 S.W.2d 502, 352 Mo. 1176.

⇐130. Possession and use.

⇐130 (1). In general.

Mo. 1880. In the absence of any provision of a will, and an order or decree of the court having jurisdiction to make it, an executor has no authority to dedicate lands belonging to the estate.

Kaime v. Harty, 73 Mo. 316, reversing 4 Mo.App. 357.

Mo.App. 1910. Rev.St.1899, § 130, Ann. St.1906, p. 379, V.A.M.S. § 462.280, providing that the administrator shall not control the real estate of the deceased unless the probate court shall, on being satisfied that it is necessary to rent the same to pay the debts, make an order requiring the administrator to take possession of and rent the same, etc., provides for the administrator renting the real estate when an order of the

For references to other topics, see Descriptive-Word Index

probate court is made therefor, and when such order is made, the administrator is in full charge of the real estate with the right to sue for and recover the same to the same extent that the decedent might have done.

Meeks v. Clear Jack Mining Co., 124 S.W. 1084, 141 Mo.App. 648.

Mo.App. 1937. In proceedings by sole devisee to set aside order directing executor to take charge of realty of estate, evidence *held* insufficient to show that sole devisee consented to order of probate court permitting executor to take charge of realty as respects whether devisee was estopped to challenge correctness of probate court's action. Mo. St.Ann. § 130, p. 80, V.A.M.S. § 462.280.

Field v. French's Estate, 106 S.W.2d 925.

Executor could not lawfully take possession of realty disposed of by testatrix' will until so ordered by probate court nor could probate court make such an order unless it was founded upon fact that realty was needed to pay testatrix' debts. Mo.St.Ann. § 130, p. 80, V.A.M.S. § 462.280.

Field v. French's Estate, 106 S.W.2d 925.

Evidence that claims allowed against testatrix' estate consisted of a claim for $11,799 secured by a trust deed on business property of an appraised value of $17,500 and unsecured claims aggregating $347.88, for the payment of which the estate had the sum of $1,446.98 on hand in cash, *held* to justify finding of circuit court upon trial de novo on appeal from judgment of probate court that it was not necessary for executor to take possession of and rent realty for payment of debts of estate. Mo.St.Ann. § 130, p. 80, V.A.M.S. § 462.280.

Field v. French's Estate, 106 S.W.2d 925.

Mo.App. 1945. Under statute authorizing the probate court to make an order requiring an executor or administrator to take possession of and rent realty where necessary for payment of debts due from the estate, the order may be entered on the application of any creditor as well as at the instance of the probate court so long as the order is based upon the jurisdictional fact that the realty is needed for payment of debts. Mo.R.S.A. § 129, V.A.M.S. § 462.280.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

⇐130(2). Actions to recover possession.

Mo. 1898. An administrator has only such powers over the real estate as are conferred by Rev.St.1889, art. 7, § 129, V.A.M.S. § 462.280, by which he may rent the land of deceased to pay debts, in obedience to a recorded order of the probate court, and take possession of same by its order, in which event he may maintain an action for possession. Hence he cannot maintain ejectment for the land, nor a suit to remove a cloud from the title, in the absence of an order.

Hall v. Farmers' & Merchants' Bank, 46 S.W. 1000, 145 Mo. 418, affirmed Kerfoot v. Farmers' & Merchants' Bank, 31 S.Ct. 14, 218 U.S. 281, 54 L. Ed. 1042.

Mo. 1908. Rev.St.1899, § 130, Ann.St. 1906, p. 379, V.A.M.S. § 462.280, prohibiting an administrator from renting or controlling decedent's real estate, unless the probate court orders the land to be rented, in which case the administrator may maintain an action for the recovery of such real estate, negatives any right of the administrator to bring such action for any other purpose, and hence he could not bring ejectment against heirs to recover land for the payment of debts of the estate.

Grant v. Hathaway, 114 S.W. 609, 215 Mo. 141, 15 Ann.Cas. 567.

Mo. 1914. An administratrix, not being the proper party to prosecute ejectment, could not maintain an appeal in an action, originally instituted by intestate.

Whitworth v. Barnes, 165 S.W. 992, 256 Mo. 468.

Mo. 1927. Plaintiff *held* not entitled to prevail against defendant holding as administrator under order of probate court. Rev. St.1919, § 130, V.A.M.S. § 462.200.

Rollins v. Shaner, 202 S.W. 419, 316 Mo. 953.

Heirs may not prevail in ejectment against administrator in possession under order of probate court.

Rollins v. Shaner, 202 S.W. 419, 316 Mo. 953.

Mo.App. 1916. Under Rev.St.1909, §§ 7687, 7688, V.A.M.S. §§ 534.260, 534.270, administrator pendente lite was invested with authority, when acting under order of the probate court requiring him to take possession of decedent's realty and rent it, to bring actions of unlawful entry and detainer against occupants.

Diehr v. Dean, 187 S.W. 602.

⇐131. Rents and profits.

Mo. 1875. The rule holding an executor responsible to the estate for transcending his power in taking charge of the real estate and collecting the rents applies, although the

heirs collect them as his agents, and he charges a commission thereon.

Gamble v. Gibson, 59 Mo. 585.

Mo. 1892. An administrator is not chargeable as administrator for rents collected by him from land of the intestate in Illinois, where such rents accrued after the intestate's death, in the absence of any proof that the laws of Illinois gave him as administrator any power to collect such rents.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Where the land of an intestate is left in possession of the heirs, and the administrator, with their consent, pastures his mules on such land, he is not chargeable as administrator with the value of the pasturage.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo.App. 1876. Where the rents and profits of property received by an executor were collected during the two years following testatrix's death, while her estate was still unsettled, and there was a possibility of its being insolvent, he was not liable to an action by a devisee for the rents.

Gamage v. Bushell, 1 Mo.App. 416.

Mo.App. 1877. The administrator of a decedent may maintain an action to recover rents under a lease made by the intestate; the consent of the heirs to such suit being presumable.

Green v. Bell, 3 Mo.App. 291.

Mo.App. 1884. Under Rev.St. §§ 70, 129, 130, 146, making it the duty of the administrator to inventory real estate, authorizing him to lease it under direction of the probate court and to sell it by appropriate proceedings to pay debts and legacies where the personalty is insufficient, an administrator who retains charge of the real estate and collects the rents is bound to account for them to the probate court, and his sureties are liable if he fails to so account.

Lewis v. Carson, 16 Mo.App. 342.

Mo.App. 1897. An order of the probate court, made by virtue of the administration law, Rev.St.1889, § 120, V.A.M.S. § 462.280, directing an administrator to take possession of lands and lease the same for the payment of debts has no retrospective effect, and does not authorize the administrator to claim rents accruing after the owner's death and before the administrator entered into possession under the order.

Bealey v. Blake's Adm'r, 70 Mo.App. 229.

Mo.App. 1903. Where an administrator collected the rents of decedent's lands and reported them to the probate court, and was charged therewith as administrator, he and his sureties were bound to account for such rents, notwithstanding that the probate court had not ordered him to rent the land.

Lyons v. Lyons, 74 S.W. 467, 101 Mo. App. 494.

Mo.App. 1903. Under Rev.St.1899, § 130, V.A.M.S. § 462.280, authorizing an administrator or executor to take possession and rent lands belonging to the heirs or devisees, when judicially ordered to do so, for the payment of debts, an executrix, who had not taken possession nor rented the lands under an order of court, could not collect the rents the tenant had agreed to pay the devisees, without the consent of the devisees and their agent.

Brent v. Chipley, 78 S.W. 270, 104 Mo. App. 645.

Mo.App. 1910. Rev.St.1899, § 98, Ann.St. 1906, p. 370, V.A.M.S. § 462.170, provides that all debts due by an administrator shall be considered assets, and section 99 (page 371), § 462.180, provides that if any person appoint his debtor executor, his appointment shall not discharge the debt. *Held*, that if an executor is chargeable with rent of the lands of the estate, he is liable therefor in his settlement with the probate court.

Williams v. Williams, 129 S.W. 454, 145 Mo.App. 382.

Where a will provided that the executor should sell the lands and pay the proceeds to certain legatees, it operated as a conversion of land into money at the death of testator, and the executor was not liable to the heirs for rent of the land during the time that it was occupied and cultivated by him.

Williams v. Williams, 129 S.W. 454, 145 Mo.App. 382.

Mo.App. 1945. In absence of probate court order directing executor to rent realty for payment of debts, rent accruing after death of owner followed principal estate and belonged to his heirs or devisees.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

An heir or devisee may consent that personal representative shall receive rents without formality of an order from probate court.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

Where probate court had not ordered executor to collect rents for payment of debts, and executor, who was also residuary devisee, collected rents in his individual capacity as devisee rather than in his official capacity as executor, claim that he should be required to account for rents as executor, on

theory that duties he owed as executor were paramount to his rights as residuary devisee, could only be asserted in a court of equity and was beyond jurisdiction of probate court.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

Where probate court had not ordered executor, who was also residuary devisee, to collect rents for payment of debts, rents belonged to him as residuary devisee and probate court was without authority to require him to account for the rents as assets of the estate.

In re Bartels' Estate, 187 S.W.2d 348, 238 Mo.App. 715.

⇐132. Repairs and improvements.

Mo. 1880. Rev.St.1879, § 131, providing that, where any house, fence, or other improvement on real estate of a decedent requires repairs, the court will, on the application of any person interested, order the repairs to be made, does not authorize an administrator to make repairs without an order, nor does it authorize an administrator to erect new structures on the premises of his intestate.

Ritchey v. Withers, 72 Mo. 556.

Mo. 1898. Under Rev.St.1879, § 131, providing that the court may order necessary repairs to be made to improvements on real estate of a decedent, by the administrator, no recovery can be had for repairs where no order was obtained.

Clark v. Bettelheim, 46 S.W. 135, 144 Mo. 258.

Mo. 1903. Rev.St.1899, § 130, V.A.M.S. § 462.280, prohibits an administrator from controlling the real estate of the decedent, unless the probate court shall be satisfied that it is necessary to rent the estate for the payment of its debts. Section 131, § 462.300, authorizes repairs on houses in the possession of the administrator. Sections 100, 101, authorize the employment of labor to preserve the estate. A probate court directed an administrator to complete buildings commenced by the intestate in his lifetime, and to take charge of the intestate's improved real estate, and to insure the buildings thereon. There was no showing that the personal estate of the intestate was insufficient to pay the debts. *Held*, that the orders of the court were void, and the sums paid by the administrator to complete the buildings, to pay taxes, insurance, and repairs on the real estate could not be allowed in his settlement as credits, and the rents accruing after decedent's death collected by him could not be charged against him.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

Mo.App. 1879. Under Wag.St. p. 95, § 12, providing that an administrator shall "collect and preserve the estate" of his decedent, the administrator has no authority to expend money for improvements on real estate of the decedent.

In re Motier's Estate, 7 Mo.App. 514.

Mo.App. 1884. Where an administrator, with the tacit consent of the heirs, who made no application to the probate court, under Rev.St. § 130, for an order on him to deliver possession of the realty, took possession of the realty and received the rents and profits, he was bound to pay taxes, cause necessary repairs to be made, and keep the realty from going to destruction in his hands so far as practicable.

Lewis v. Carson, 16 Mo.App. 342.

Mo.App. 1886. The expenses of repairs to the dwelling of a decedent, incurred by the widow without an order of the court authorizing the repairs, cannot be made a charge against the estate.

Powell v. Powell, 23 Mo.App. 365.

Mo.App. 1945. An executrix, taking charge of testatrix' realty without required authority from probate court, was not entitled to allowance of expenses for repairs, etc., on final settlement without prior allowance thereof, in absence of showing that she took charge of realty with tacit consent of testatrix' heirs and collected rents. Mo.R.S.A. §§ 129, 130, 220, V.A.M.S. §§ 462.280, 462.290, 465.100.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐133. Mortgaged and incumbered property.

Mo. 1872. The payment by an administrator out of the general fund of a debt secured by a deed of trust does not extinguish the incumbrance, but the estate of the deceased becomes entitled to the amount thus paid, and the same may be recovered out of the lands in the hands of a purchaser, who bought at an administrator's sale subject to the deed of trust; the recovery to be by an administrator de bonis non for the benefit of the estate.

Welton v. Hull, 50 Mo. 296.

Mo. 1886. An administrator having used the personal assets to redeem land of the intestate from a mortgage not due, paying a bonus, a subsequent approval by the probate court is retroactive, and has the same effect as an order to redeem previously made; Rev. St.1879, § 143, providing that, if one die leaving land incumbered by mortgage, the court may, if in its judgment it will promote the

interest of the estate, order the administrator to redeem out of the personal assets.

Scudder v. Ames, 14 S.W. 525, 89 Mo. 496.

Mo. 1944. A grantee's executrix was bound to account for rents and profits to grantor if deed was a mortgage.

Brewster v. Terry, 180 S.W.2d 600, 352 Mo. 967, transferred 172 S.W.2d 5.

Mo.App. 1880. The managing trustee and executor paid amounts upon deeds of trust in order to prevent the property from going to sale, and the house and lot accepted by the widow as dower from being sacrificed. It was subsequently claimed that these payments were for the benefit of the creditors, as thus other property was relieved from the claim of the widow for dower. *Held*, that such lien claims as to the estate were fifth-class claims, and, if prematurely paid, were at the executor's risk, since he had no right to assume, especially in the doubtful and involved condition of the estate, that he could safely pay interest and charges upon the indebtedness secured by deeds of trust upon the widow's property, or taxes and insurance upon the property, or amounts to prevent the filing of lien claims upon the children's realty, on the basis that such debts had a preference and were to be paid in full, as whatever preference existed was as against that property and the devisees of it, not as against the general fund devised to the executors for equal distribution among the creditors of the same class, and the court below properly refused to allow these credits to the executor.

Schoeneich v. Reed, 8 Mo.App. 356.

Mo.App. 1889. The proper course of an administrator, upon discovering that the property was incumbered, was to apply to the probate court for leave to redeem the mortgaged property, under Rev.St. § 143, V.A.M.S. § 462.370.

Meeker v. Straat, 38 Mo.App. 239.

Mo.App. 1902. Interest paid by an administrator on an incumbrance on the real estate of a decedent without an order of the probate court, where the equity of redemption is afterwards lost by foreclosure, is not a proper item of credit in favor of the administrator.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

An order for the sale of the equity of redemption in mortgaged lands to pay debts does not warrant the administrator in the payment of interest due on such incumbrance, and if such payment is to the benefit of the estate the administrator will be required to give the estate that benefit, and if it entails loss the administrator must bear it.

Springfield Grocer v. Walton, 69 S.W. 477, 95 Mo.App. 526.

⇐134. Leaseholds of decedent.

Mo. 1876. Under Wag.St. p. 90, § 52, an administratrix was entitled to credit for $12,333.33, for rent of a hotel building leased by decedent and which the administratrix continued to operate until she secured a purchaser for the furniture of the hotel, appraised at $11,415.92, for $20,000, where it appeared that by so doing she was enabled to make a much more advantageous sale, and that by surrendering the lease the furniture would have brought but little at a sale.

Merritt's Estate v. Merritt, 62 Mo. 150.

Mo. 1917. On death of lessee equitable interest passed to widow and children, and where leasehold was not used for purposes of administration, on estate being closed, legal title passed to widow and children regardless of illegal sale by administrator, in view of Rev.St.1909, §§ 332, 349.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 S.W. 42.

Mo.App. 1879. The law does not permit an executor to waive the term, so as not to be liable upon the promise of the testator to pay annual rent, so long as the executor has assets.

Traylor v. Cabanne, 8 Mo.App. 131.

⇐135. Contracts of decedent.

Mo. 1852. Under the statute concerning administration, Rev.Code 1845, art. 3, §§ 36, 39, the probate court may order an administrator to execute specifically a contract of his intestate to make a deed of land after she became of age, confirmatory of one given during minority, upon proof that she affirmed the contract verbally after she became of age. Receiving part of the consideration money, and expressing herself satisfied, is a sufficient ratification.

Ferguson v. Bell's Adm'r, 17 Mo. 347.

Mo. 1854. The probate court cannot direct an administrator to perform specifically a contract for the conveyance of land, made by his intestate, unless the contract of the intestate was in writing.

Schulter's Adm'r v. Bockwinkle's Adm'r, 19 Mo. 647.

Mo. 1868. Gen.St.1865, c. 122, p. 496, § 2, providing that where a decedent has purchased real estate without completing payment, and the completion of such payment would be beneficial to his estate, the administrator by order of court may complete such payment, contemplates that the court must

examine into the affairs and condition of the estate, and determine whether it will benefit the estate, before making such order, and a mere allowance of the account by the administrator is not sufficient to complete such transaction.

Lake v. Meier, 42 Mo. 389.

Mo. 1880. 1 Rev.St.1855, p. 148, § 39, requiring a petition for specific performance of a decedent's contract to convey realty to be verified by the affidavit of the petitioner, must be strictly construed, and under that statute the verification of the petition is one of the essentials of the jurisdiction of the probate court in the matter.

Baldwin v. Whitcomb, 71 Mo. 651.

Mo. 1909. The authority given an administrator by Rev.St.1899, §§ 129, 130, 146, Ann.St.1906, pp. 379, 380, 384, V.A.M.S. §§ 462.280, 462.300, 463.180, on an order to rent the land, make repairs on fences and buildings, and sell land to pay debts, does not include authority to convey in performance of a contract of decedent, and hence an administrator cannot be required to do so by decree in equity.

McQuitty v. Wilhite, 117 S.W. 730, 218 Mo. 586, 131 Am.St.Rp. 561.

Rev.St.1899, § 173, Ann.St.1906, p. 394, V.A.M.S. § 463.450, providing that vendee, having a written contract with decedent for conveyance of land may present a petition asking that the administrator be required to specifically perform by making a deed, does not authorize such performance of an oral contract by decedent.

McQuitty v. Wilhite, 117 S.W. 730, 218 Mo. 586, 131 Am.St.Rep. 561.

Even if an administrator could be required to convey land, a petition to enforce conveyance is insufficient if it fails to allege there are debts for the payment of which a sale is required, and the probate court has ordered it.

McQuitty v. Wilhite, 117 S.W. 730, 218 Mo. 586, 131 Am.St.Rep. 561.

Mo.App. 1889. No contract can be avoided by an administrator on the ground of the fraud of his decedent.

McFarland v. Creath, 35 Mo.App. 112.

⇐136. Sale.

⇐137. —— Authority and duty in general.

U.S.Mo. 1856. Where land was mortgaged to administrator to secure debt due decedent, the debt being divided into installments which were not paid, sale of land was legitimate exercise of powers of administrator.

Long v. O'Fallon, 60 U.S. 116, 19 How. 116, 15 L.Ed. 550.

Mo. 1855. The heirs of an intestate cannot, by obtaining a decree vesting in them the legal estate of which he died seised in equity, defeat or affect the right of the administrator to sell the intestate's equity in the land for the payment of the debts due by him; and the purchaser at an administrator's sale may have the legal estate conveyed to him.

Wolf v. Robinson, 20 Mo. 459.

Mo. 1871. Act Jan. 28, 1859, amendatory of Act Feb. 9, 1857, authorizing a certain executor to sell the estate of his decedent for the benefit of his heirs, was not void because it failed to require a bond.

Gannett v. Leonard, 47 Mo. 205.

Under Act Jan. 28, 1859, amendatory of Act Feb. 9, 1857, authorizing an administrator to sell the estate of Watts, deceased, for the benefit of his heirs, the authority to sell was not unwarranted, because it failed to show that the heirs were minors; for, if the persons whose property was sold were in fact minors at the time of the sale, that fact made the authority complete.

Gannett v. Leonard, 47 Mo. 205.

Mo. 1894. Where, at the instance of testator's widow, who was one of his devisees and executors, a special act is passed authorizing the other executor to sell testator's real estate and execute a deed therefor, a sale by him of the land is valid as to her interest; she having between the passing of the act and the time of the sale come under disability by remarriage.

Clusky v. Burns, 25 S.W. 585, 120 Mo. 567.

Mo. 1933. Ordinarily, executor or administrator cannot sell realty to pay debts without probate court order.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversed 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

Mo.App. 1906. A testator devised to his wife a certain tract of land and also an undivided one-half interest in another tract, and named the wife as executrix and one of the other devisees as executor of the will. The wife, describing herself as executrix, joined with other devises and the executor in executing a contract giving an option to purchase the land and also appointing a certain person as agent to make sale thereof. *Held*, that the wife was individually bound by contract.

Millard v. Smith, 95 S.W. 940, 119 Mo. App. 701.

Mo.App. 1944. An administrator cannot make a sale or enter into a contract for sale

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of a leasehold for term longer than three years without having first complied with statutory requirements in procuring issuance of order of sale by probate court after a a hearing and taking of testimony. Mo.R.S.A. §§ 116, 141–144, 1337, V.A.M.S. §§ 463.130, 463.170, 463.180, 463.250, 463.260.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

⇐138. —— Power under will.

⇐138(1). In general.

Mo. 1919. Will directing that "should my wife prefer living near a town in this or any other state the land may be sold," etc., and that wife be made executrix "with full power to carry out" will, *held* to give wife power of sale.

Doneghy v. Robinson, 210 S.W. 655.

Mo. 1931. Will directing executor to sell realty to distribute estate conveys no title to executor, but gives only power of sale. Rev.St.1929, §§ 1557, 1560, V.A.M.S. §§ 528.130, 528.160.

Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, transferred 1 S.W.2d 205, transferred 53 S.W.2d 405.

Mo. 1933. Will conferring discretionary power of sale creates personal trust independent of donee's official character as executor.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversed 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

Mo.App. 1932. Where beneficiaries of will elect to take land instead of proceeds, executor cannot exercise authority under will to sell land.

Kaufmann v. Kaufmann, 43 S.W.2d 879, 226 Mo.App. 172.

Mo.App. 1932. Under will directing executor to sell real estate under directions of probate court to carry out provisions of will, it was mandatory duty of executor to sell real estate.

Hull v. McCracken, 53 S.W.2d 405, transferred 39 S.W.2d 351, 327 Mo. 957, transferred 1 S.W.2d 205.

⇐138(2). Implied power.

For cases from other jurisdictions, see other Key Number Digests.

⇐138(3). Control by court.

Mo. 1929. Court may order sale of converted property of testator to accomplish purposes of will.

Ganahl v. Ganahl, 19 S.W.2d 898, 323 Mo. 620.

Mo.App. 1932. Court will enforce testatrix' intention respecting sale of real estate as expressed in will, without determining whether she chose wisely or unwisely.

Hull v. McCracken, 53 S.W.2d 405, transferred 39 S.W.2d 351, 327 Mo. 957, transferred 1 S.W.2d 205.

⇐138(4). Purposes of sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐138(5). Who may exercise.

Mo. 1871. Under Wag.St. c. 2, art. 3, § 1, an administrator with the will annexed can legally execute a power of sale of lands, which was vested in the executor named in the will, where such executor died without executing the power, and the will absolutely directed the lands to be sold, and no special trust was reposed in the executor named.

Dilworth v. Rice, 48 Mo. 124.

Mo. 1875. Where the terms of a will authorized the "executors" to sell lands, but only one of them qualifies, he has the power, acting alone, to make the sale; for in such case the co-operation of additional executors is not required, as Wag.St. p. 72, § 11, disqualifies executors who do not give bond.

Phillips v. Stewart, 59 Mo. 491.

Where testatrix left no personal estate, devised certain real estate specifically, and charged her debts on the residue, which she directed her executor, with the advice and consent of her daughter and son, to sell, and with the proceeds pay her debts, etc., a sale and conveyance by the executor with consent of the daughter after the death of such son, and without an order of the probate court, was authorized, and conveyed a good title to the purchaser as against the heirs and residuary legatees of testatrix, under Rev.St. 1899, § 45, V.A.M.S. § 461.530, providing that, when a will directs the sale of real estate, the sale shall be made by the executor if no other person is appointed, or if the person appointed refuses to perform the trust "or die before he shall have completed it."

Mo. 1902. Wisker v. Rische, 67 S.W. 218, 167 Mo. 522.

Mo. 1902. Wisker v. Spring Ave. Realty Co., 67 S.W. 1101, 167 Mo. 534.

Mo. 1922. Where the will gives the executors a power and a trust by directing the sale of a tract of land to satisfy a trust deed against that land and two other tracts, the executors became trustees as well, and may make the sale as trustees, even though they should refuse to qualify as executors.

Carr v. Barr, 243 S.W. 98, 294 Mo. 673.

For references to other topics, see Descriptive-Word Index

Mo.App. 1890. Where the power of sale conferred on an executor by a will is positive and peremptory, and a kind that the executor cum testamento annexo can execute, the mandate of Rev.St.1889, § 163, V.A.M.S. § 463.310, providing that the sale and conveyance of real estate under a will shall be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for that purpose, or if such person refuses to perform the trust, is that the administrator with the will annexed shall sell the real estate; but the statute does not apply where the execution of the trust power is dependent on a contingency that may not happen for a great length of time, or on one that may not happen at all, or where it is not, by the express terms of the will, to be executed for a great length of time, as when the time of its execution is fixed and beyond the time in which an executor or administrator is required by law to make final settlement, or where there is something in the trust that renders it impossible for the executor to execute and carry it out; but in such cases the beneficiary is not without remedy, for equity on his application will appoint a trustee to execute the trust.

In re Rickenbaugh, 42 Mo.App. 328.

Mo.App. 1931. Where testatrix directed realty to be sold without appointing person to make sale, *held* power of sale inhered in office of executrix, and was not personal trust. Rev.St.1929, § 133, V.A.M.S. § 463.140.

Long v. Long, 38 S.W.2d 288.

⇐138 (6). Time for exercising.

Mo. 1924. Will reading, "I authorize, empower and direct my executor, * * * without obtaining order of court therefor, from time to time, to sell all real estate I may own at my death," *held* to contemplate sale by executor of realty and closing of estate within period allowed by law for administration.

In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

Widow's objection as mere devisee to sale of realty directed by will to be sold *held* not justification for executor's delay in selling.

In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

Mo. 1933. Personal trust, created by will conferring discretionary power of sale, survives final administration of estate and continues until trust purposes are accomplished or donee has had reasonable time to execute trust.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

Executor's absolute, nondiscretionary power under will to sell realty is not personal, but official, and must be exercised during executorship.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

Mo.App. 1907. A direction in a will to the executor to sell testator's land "as soon as the same can be done without sacrifice" refers to the time when the land can be sold, and does not lessen his duty when he decides to offer it for sale to employ the degree of diligence characterizing the conduct of a reasonably prudent person in the management of his own affairs, and he takes the proceeds of the sale in his capacity of executor.

In re Branch's Estate, 100 S.W. 516, 123 Mo.App. 573.

Mo.App. 1930. Testator's direction that realty be sold as soon as convenient and fair price can be realized should be complied with within reasonable time.

Hood v. Shively, 31 S.W.2d 283.

Mo.App. 1940. Under will devising property to testator's children and to children of deceased child, and directing that all notes which testator had paid for any of sons or sons-in-law should be charged against son or daughter, as case might be, and giving executors power to sell personal property within one year but providing that no limit should govern executors as to disposition of real estate, and providing that they should use their own judgment as to best time to dispose of real estate, it was duty of executors to sell real estate and distribute proceeds, and beneficiaries were not entitled to have estate settled without disposing of the real estate.

Diebold v. Diebold, 141 S.W.2d 119, 235 Mo.App. 83, transferred 133 S.W.2d 401.

⇐138 (7). Property subject to sale.

For cases from other jurisdictions, see other Key Number Digests.

⇐138(8). Duration and termination of power.

Mo. 1929. If testator's personalty was insufficient to pay debts and legacies, executor was required to sell portion of realty necessary for that purpose, though five-year period allowed by testator for administering estate had expired.

Ganahl v. Ganahl, 19 S.W.2d 898, 323 Mo. 620.

For later cases see same Topic and Key Number in Pocket Parts

⇐138 (9). Execution of power and confirmation of sale.

Mo. 1933. Will directing sale of land at widow's death "to best advantage" *held* to require sale by negotiation with same care and judgment as in disposing of one's own property, unless public probate sale seems better under circumstances.

Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367.

⇐139-140.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐141. —— Manner and conduct.

Mo.App. 1907. An executrix, directed by the will of her deceased husband to sell his land as soon as the same could be done without sacrifice, who sold it to her son at the highest price she had reason to think could be obtained therefor, without attempting to obtain other bids and without putting it on the market, exercised proper prudence in the management of the estate.

In re Branch's Estate, 100 S.W. 516, 123 Mo.App. 573.

⇐142. —— Terms and conditions.

For cases from other jurisdictions, see other Key Number Digests.

⇐143. —— Validity.

Mo.App. 1944. An executor or administrator in selling decedent's realty must act within scope of his powers under statute and according to directions contained in order of court, and an agreement or bond made by him before obtaining such order to sell is void. Mo.R.S.A. §§ 116, 141–144, 1337, V.A.M.S. §§ 463.130, 463.170, 463.180, 463.250, 463.260, 513.200.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

Where administrator did not obtain order of probate court authorizing sale of leasehold which had unexpired term of more than three years, neither the administrator nor the estate was bound by purported contract and hence purchaser of such leasehold likewise was not bound thereby. Mo.R.S.A. §§ 116, 141–144, 1337, V.A.M.S. §§ 463.130, 463.170, 463.180, 463.250, 463.260, 513.200.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

⇐144. —— Purchase by executor or administrator.

For cases from other jurisdictions, see other Key Number Digests.

⇐145. —— Conveyance.

Mo. 1913. A conveyance made by an executor under a power in the will cannot be construed to be his act as executor where on its face it appeared as his individual conveyance.

Armor v. Frey, 161 S.W. 829, 253 Mo. 447.

⇐146. —— Payment or recovery of purchase money.

Mo.App. 1944. A written proposal submitted to administrator for purchase of decedent's leasehold for $35,000, which proposal was accompanied by a $4,000 cashier's check as earnest money, and contained a statement that it was subject to approval of probate court did not develop into a binding contract notwithstanding administrator's acceptance thereof where such leasehold which had unexpired term of more than three years could only be sold under order of probate court. Mo.R.S.A. §§ 116, 141–144, 1337, V.A.M.S. §§ 463.130, 463.170, 463.180, 463.250, 463.260, 513.200.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

Where there was no valid contract for purchase of decedent's leasehold, purchaser could replevy the cashier's check which he had given to administrator as earnest money as against contention that purchaser's remedy was to sue in equity for rescission of the contract.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

A purchaser of leasehold from administrator under invalid contract was not precluded from recovering possession of cashier's check which purchaser had given as earnest money on ground that administrator was entitled to reasonable time in which to present the matter to the probate court, and to procure approval of the contract and that purchaser repudiated the contract before a reasonable time elapsed. Mo.R.S.A. §§ 116, 141–144, 1337, V.A.M.S. §§ 433.130, 463.170, 463.180, 463.250, 463.260, 513.200.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

⇐147. —— Application of proceeds.

Mo. 1867. Notwithstanding the general rule that the personal estate is the primary fund for the payment of debts, it is now the established doctrine that the personal fund will be exempted, if the intention of the testator in its favor can be collected from a sound interpretation of the whole will taken together.

Brant v. Brant, 40 Mo. 266.

For references to other topics, see Descriptive-Word Index

Mo. 1923. On the sale of land by an executor, pursuant to a power to sell it and distribute the proceeds among the legatees, such proceeds become a trust fund in the executor's hands for payment to the legatees of their respective interests.

Turner v. Hine, 248 S.W. 933, 297 Mo. 153.

⇐148. —— Title and rights of purchasers.

Mo. 1916. Under administrator's private sale of land emanating from the government, void because not authorized by order of sale, purchaser and his grantees took no title.

Wofford v. Martin, 183 S.W. 603.

Mo. 1929. Purchaser of land from administrator received good title, subject to quarantine and dower rights. Rev.St.1870, § 2693.

Schowe v. Kallmeyer, 20 S.W.2d 26, 323 Mo. 899.

⇐149. —— Setting aside.

Mo. 1910. In a suit by residuary legatees to set aside a deed made by the executor to his son, who reconveyed it to his father, the son was not a necessary party because he was a mere conduit for the passing of the legal title to the father.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

While inadequacy of price is not ordinarily sufficient to set aside a sale, it is a circumstance to be weighed in connection with other evidence on the issue of fraud.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

Where an executor with power to sell sold real estate for about one-half its value and appropriated the advantage to himself by obtaining title to the property to the detriment of the residuary legatees, the latter could sue to set aside the conveyance and were not required to waive the fraud and proceed to compel the executor to report his sale and account for the proceeds.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

Mo. 1911. Where a testator died in 1868, authorizing his wife, as executrix, to sell property to pay his debts, and within a few years thereafter she sold some of the property for that purpose, the claim that she did not obtain a fair value for land sold and that there was a misappropriation of rents of some of the others, made by the children more than 30 years after, was barred for laches; they having had ample opportunity for redress under Rev.St.1879, § 43, by application for revocation of the letters testamentary.

Dewein v. Hooss, 139 S.W. 195, 237 Mo. 23.

Mo.App. 1935. In action against executor of estate to recover part of purchase price for land sold to plaintiff by executor, evidence *held* not to show fraud or false representations on part of executor as alleged in plaintiff's petition.

Cory v. Conqueror Trust Co., 86 S.W.2d 611.

⇐150. Lease.

Mo. 1872. An administrator, under direction of court having probate jurisdiction, may lease the realty belonging to the decedent.

Lass v. Eisleben, 50 Mo. 122.

An administrator, having rented real estate under order of court, may oust the tenant by forcible entry and detainer.

Lass v. Eisleben, 50 Mo. 122.

Mo. 1877. Under 1 Wag.St. p. 89, § 48, authorizing executors and administrators to lease the real estate of their decedents, when so directed by competent authority, and to receive and collect the rents, and 2 Wag.St. p. 973, § 51, prohibiting partition of real estate until after the estate of the owner has been settled, an executor, when so ordered by the court, may lease the real estate and collect the rents thereof.

Eoff v. Thompkins, 66 Mo. 225.

Mo. 1897. Under Rev.St.1889, § 129, V.A.M.S. § 462.280, an administrator may, pursuant to the order of the probate court, rent the land of his decedent; but, without an order of the probate court, the administrator has no control over such real estate.

Thorp v. Miller, 38 S.W. 929, 137 Mo. 231.

Mo. 1913. Rev.St.1909, § 139, V.A.M.S. § 462.280, providing that no executor shall rent the real estate, unless ordered by the probate court to do so for the term not exceeding two years, does not mean that the executor, at the expiration of two years from the date of the order of court, ipso facto loses all control or interest in the land, but only that he may not rent the land for a longer term.

Spicer v. Spicer, 155 S.W. 832, 249 Mo. 582, Ann.Cas.1914D, 238.

Mo. 1927. Statute relating to executor's renting of realty *held* not in conflict with provision relative to his control and management thereof. Rev.St.1919, §§ 129, 130, 2542, V.A.M.S. §§ 462.280, 462.290, 481.020.

Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.

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Mo. 1936. Lease given by administrator for fifty years on property held in trust created by will, providing that income from leased property should be divided between testator's grandchildren, *held* valid, where lease provided that it was subject to provisions of will and lessees did not claim lease could survive termination of trust.

Carter v. Boone County Trust Co., 92 S. W.2d 647, 338 Mo. 629.

Beneficiary of trust created by will providing for income derived from certain property to be equally divided between testator's grandchildren *held* estopped to deny right of administrator to execute lease whereby seven years' rent was advanced by lessee and used to help rebuild building which had been destroyed by fire, where beneficiary did not object to lease when made and accepted income derived from building from other tenants without objection for seven years.

Carter v. Boone County Trust Co., 92 S. W.2d 647, 338 Mo. 629.

Rent of $5,000 per year for trust property worth $115,000, four-fifths of which was leased by administrator to lessee, *held* adequate, where lessee advanced seven years' rent without interest to rebuild building which was destroyed by fire, and invested $19,000 in improvements, which made the rent about the average paid in best business block in the city, notwithstanding rents advanced after lease was executed and lessee subleased space at rate in excess of what it was paying.

Carter v. Boone County Trust Co., 92 S. W.2d 647, 338 Mo. 629.

Mo.App. 1876. Wag.St. p. 89, § 48, provides that executors may lease real estate, and section 49 declares that, whenever the court shall be satisfied that any real estate need not be sold to pay debts, the executor shall deliver possession of it to the person entitled thereto. *Held*, that while an action against the estate is pending, which, if sustained, will render the estate insolvent, the devisee of land leased by the executor by order of court cannot recover the same.

Eoff v. Tompkins, 2 Mo.App. 464.

Mo.App. 1884. Rev.St.1879, §§ 129, 2455, authorizes an executor or administrator to maintain forcible entry and detainer for a chattel interest in lands, where formerly they were obliged to bring ejectment.

Kelly v. Clancy, 15 Mo.App. 519.

⇐151. Mortgage.

Mo. 1911. A will authorized testator's wife, as executrix, to sell such property as she might deem best, real or personal, to pay off his indebtedness, and provided that she should not give bond or render account. Another clause bequeathed $1 each to his children, and another bequeathed the balance to his wife during her natural life, "granting her full power and absolute authority to dispose of all or so much as she desires and as might be necessary to provide for her and the children during her life," and, at her death the "residue, if any" to be divided among the children. The executrix sold for testator's indebtedness all but three town lots, on one of which was a hotel; the other two producing no revenue. *Held*, that the executrix had power to incumber the hotel property to meet the indebtedness of the testator, she retaining possession and making it her home; and it appearing that a sale would not leave sufficient property to support her.

Dewein v. Hooss, 139 S.W. 195, 237 Mo. 23.

⇐152. Property acquired by executor or administrator.

U.S.Mo. 1856. The conveyance, to an administrator, of real estate as security for a debt due his intestate, does not invest the heirs of the intestate with an equitable estate or a particular lien on the property; and a purchaser in good faith from the administrator is not obliged to look to the application of the purchase money, but is entitled to hold the property exempt from the claims of the heirs.

Long v. O'Fallon, 60 U.S. 116, 19 How. 116, 15 L.Ed. 550.

Mo. 1851. If land be purchased with money in the hands of an administrator, and for the express purpose of being subjected to the payment of the debts of the deceased, there is nothing in the policy of the law prohibiting the administrator from conveying it.

Hogan's Heirs v. Welcker, 14 Mo. 177.

Mo. 1889. An administrator who, before the enactment of the statutes relating to the purchase of land by guardians, administrators, etc., purchased land at execution sale under a judgment recovered by him in favor of the estate, and took a sheriff's deed to himself as administrator, took title as an individual, and held it in trust for the heirs and creditors of the estate, especially when he inventoried, and procured an order of sale of, and sold, the land as land of the estate.

Mabary v. Dollarhide, 11 S.W. 611, 98 Mo. 198, 14 Am.St.Rep. 639.

(C) PERSONAL PROPERTY.

⇐153. Title and authority in general.

Mo. 1901. The legal title to personal property of an intestate passes to the admin-

istrator, but the equitable title descends to the heirs.

Richardson v. Cole, 61 S.W. 182, 160 Mo. 372, 83 Am.St.Rep. 479.

Mo. 1915. The legal title to the personal property of a decedent held for distribution is vested in the administratrix until the final order of distribution is entered.

Messersmith v. Messersmith, 175 S.W. 914, 264 Mo. 610.

Mo.App. 1904. The title of an administrator to the personal estate of decedent is not absolute, but qualified. He holds as trustee, merely, for creditors and distributees, and when the debts are paid the residue descends to the heirs at law.

Byers v. Weeks, 79 S.W. 485, 105 Mo. App. 72.

Mo.App. 1910. In an action by an administrator for conversion of personalty of the estate, judgment was properly rendered for defendant, where the only act of conversion alleged occurred before plaintiff's appointment as administrator, and the evidence failed to establish such allegation.

Painter v. Painter, 124 S.W. 561, 146 Mo.App. 598.

Mo.App. 1916. Personal representative, receiving the amount due on a fire insurance policy, *held* to hold it in trust for the devisee of a life estate under the will of the insured, and for the remainder according to their interest.

Millard v. Beaumont, 185 S.W. 547, 194 Mo.App. 69.

⇐154. Possession and use.

U.S.Mo. 1870. Letters of administration being a "trust", require the administrator to take exclusive charge of the personalty of the intestate and to bring to its administration his own personal attention and judgment, and the administrator has no right to allow others to control nor to share in such administration.

Forsyth v. Woods, 78 U.S. 484, 11 Wall. 484, 20 L.Ed. 207.

C.A.Mo. 1951. Where defendants agreed in written contract to sell and deliver shares of stock to executor's deceased, and defendants failed or refused to recognize existence or validity of contract and right of executor to recover shares of stock, there was an anticipatory breach of the contract sued upon and an actual controversy between the parties, and executor's action for delivery of the stock was not premature.

Buder v. Becker, 185 F.2d 311.

In action by executor seeking recovery of certificates representing shares of stock, or of shares of stock, sold to executor's deceased under a written contract, where executor listed claimants, but asked for no relief against one claimant and did not attack validity of his claim against deceased's estate for his proportion of the stock, and under its retained jurisdiction, District Court could protect rights of that claimant, he was not an indispensable party.

Buder v. Becker, 185 F.2d 311.

Mo. 1854. The right to possession of the personal estate of an intestate, where there is an administration of the estate, is in the personal representative.

Gillet v. Camp, 19 Mo. 404.

Mo. 1898. A testator devised certain land to his wife and certain other land to his blood kin, placing a valuation on the land devised to each. After making his will, he sold these lands, taking notes for the price, and made a codicil, providing that whenever he had sold property devised to his wife the amount was to go to her in the proportion of the valuation as given in his will, and the proportion of the valuation of property devised to his blood kin was to be set apart from the personal estate, etc., declaring that sales made were with a view to carrying out the provisions of his will. *Held* that, the notes not being given solely for land which was intended for the wife, she could not require the executors to pay her part of the purchase money until the notes fell due and were paid, nor award to her notes amounting to her interest in the fund.

Clarke v. Sinks, 46 S.W. 199, 144 Mo. 448.

Mo.App. 1916. Fund, received by executor of insured upon loss of house and furniture and held in trust for the life tenant and the remaindermen under the insured's will, *held* personalty, and not realty, so that the executor was not required to use it in rebuilding a house on the land.

Millard v. Beaumont, 185 S.W. 547, 194 Mo.App. 69.

Mo.App. 1918. Whether surviving husband of wife dying without children, by right of his heirship, under Rev.St.1909, § 350, V.A.M.S. § 469.130, was entitled to a note payable to husband and wife "share and share alike" as his one-half of her personal estate, depended upon distribution in probate court, until which time such note would remain in possession of her administrator.

Messenbaugh v. Goll, 202 S.W. 265, 198 Mo.App. 698.

Mo.App. 1938. After the registered owner of an automobile had died, his executor

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was entitled to possession of automobile as a part of deceased's personal property.
Hoshaw v. Fenton, 110 S.W.2d 1140, 232 Mo.App. 137.

In replevin action for an automobile by the executor of the deceased owner, executor was entitled to possession where he claimed title, the evidence showed that he had title, and defendant admitted that executor had legal title.
Hoshaw v. Fenton, 110 S.W.2d 1140, 232 Mo.App. 137.

⚖155. Pledged and mortgaged property.

Mo.App. 1889. The proper course of an administrator, upon discovering that the property was incumbered, was to apply to the probate court for leave to redeem the mortgaged property under Rev.St. § 143, V.A.M.S. § 462.370.
Meeker v. Straat, 38 Mo.App. 239.

Mo.App. 1920. The mere fact that a chattel mortgagee, for the supposed benefit of the estate of the deceased, consented that the sale might be made in the name of the estate, he attending and receiving the sale money, would not render the sale invalid as against a creditor of the estate.
Rice's Estate v. Hudson, 225 S.W. 111.

Mo.App. 1930. Administrators had authority to make agreement for sale of mortgaged property without order from probate court.
State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.

Agreement for sale of mortgaged property by one of administrators only was sufficient to bind estate.
State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.

Mo.App. 1937. A bank, treating debt to it as extinguished and charging it off its books as loss on discovering that notes therefor were not presented for allowance against deceased maker's estate within limitation period, had no further right to retain note pledged to it by deceased as collateral, but was bound to return it to executors for inventory as additional asset of estate.
Studer v. Harlan, 109 S.W.2d 687, 223 Mo.App. 811.

⚖156. Contracts of decedent.

Mo.App. 1889. No contract can be avoided by an administrator on the ground of the fraud of his decedent.
McFarland v. Creath, 35 Mo.App. 112.

⚖157. Sale.

⚖158. —— Authority and duty in general.

Mo. 1827. Executors and administrators can sell or distribute the personal estate, and pass a good title; and creditors must look to the responsibility of such executors and administrators.
Overfield v. Bullitt, 1 Mo. 749.

Mo. 1908. An administrator has no authority to sell personal assets of the estate at a private sale without an order of the court, as required by Rev.St.1899, § 117, V.A.M.S. § 463.130.
State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Distributees, who direct an administrator to sell personal assets of the estate at a private sale without order of the probate court, are bound by his action, where he acts in good faith, and cannot hold him liable for a greater sum than he obtained on the sale.
State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Distributees cannot complain of an administrator's action in selling personal assets at private sale without order of court if they suffer no damage thereby.
State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Where an administrator sells personal assets of the estate at private sale without order of the probate court, he assumes the risk of his conduct, and, although he acts in good faith, he is liable to dissenting distributees for loss resulting from his lack of prudence and skill in making the sale.
State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

That the will gives the executor power to sell the property *held* not sufficient to dispense with the necessity of complying with the statutes as to the manner of selling the property of decedent.
Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.
Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.
Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182, opinion quashed 247 S.W. 411, opinion of Supreme Court conformed to 249 S.W. 1119.

Where a transfer of stock of a corporation is made by an executor as such, the corporation is chargeable with notice that such executor is acting under a will, and is like-

wise chargeable with knowledge of the contents of the will.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182, opinion quashed 247 S.W. 411, opinion of Supreme Court conformed to 249 S.W. 1119.

Where the statutory law prescribes that sales by executors of corporate stock shall be made in a particular manner, the corporation in making a transfer of stock is chargeable with notice of that fact, and must at its peril, see that the law is complied with.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182, opinion quashed 247 S.W. 411, opinion of Supreme Court conformed to 249 S.W. 1119.

Where a holder of stock in a bank bequeathed it to his wife, who also was executrix, and she procured it to be transferred to herself, and subsequently sold it, the bank was bound to know that no order of the probate court authorizing the transfer and sale had been obtained, and also that children not mentioned in the will had an interest therein.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182, opinion quashed 247 S.W. 411, opinion of Supreme Court conformed to 249 S.W. 1119.

Mo.App. 1940. Provision of will directing executors to dispose of personal property within one year after testator's death had reference to tangible property instead of intangible property such as notes.

Diebold v. Diebold, 141 S.W.2d 119, 235 Mo.App. 83, transferred 133 S.W.2d 401.

Mo.App. 1940. Under statute authorizing executor to sell personalty other than perishable goods for the purpose of paying debts and legacies, executor was authorized to sell securities to pay legacies without order of court. Mo.St.Ann. § 113, p. 75, V.A.M.S. § 463.020.

In re Flynn's Estate, 142 S.W.2d 1069.

Where executor sold certain assets at a loss, if executor used diligence to collect assets, costs of sale of such assets was a proper credit to him, otherwise not.

In re Flynn's Estate, 142 S.W.2d 1069.

Mo.App. 1944. Any transfer of a leasehold by administrator at private sale without having first procured an order of probate court for such private sale and prescribing terms thereof would be void even if leasehold could be sold as personalty. Mo.R.S.A. § 116, V.A.M.S. § 463.130.

Steinbaum v. Wallace, 176 S.W.2d 683, 237 Mo.App. 841.

⇐159. —— Time for making.

For cases from other jurisdictions, see other Key Number Digests.

⇐160. —— Manner and conduct.

Mo. 1908. A distributee of a decedent's estate cannot bind another distributee by directions authorizing the administrator to sell assets at private sale without order of the probate court.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1910. Under Rev.St.1899, §§ 112, 113, Ann.St.1906, p. 376, V.A.M.S. §§ 463.010, 463.020, empowering an administrator to sell personal property necessary to pay debts or legacies without an order of court at public sale, an administrator has no power in any case to sell personal property at private sale, except on an order of a probate court directing a private sale and prescribing the terms thereof, as required by section 117, § 463.130.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Under Rev.St.1919, §§ 111, 112, and 116, V.A.M.S. §§ 463.010, 463.020, 463.130, an administrator or executor can sell personal property of the estate necessary to pay debts or legacies without an order of court at public sale, but in no case can personal property be sold at private sale except after application and order of court directing such sale and prescribing its terms.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1927. That administrator authorized to make private sale sold merchandise at retail instead of in bulk is not conclusive evidence of mismanagement.

Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

⇐161. —— Terms and conditions.

Mo. 1898. Administrators are properly credited with the difference between the par value of bonds and what they sell them for; it not appearing they were sold for less than their market value.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

⇐162. —— Validity.

Sales of property at private sale held without complying with Rev.St.1919, §§ 111, 112, 116, V.A.M.S. §§ 463.010, 463.020, 463.130, relating to sales of a decedent's estate by personal representatives, are void, and a sale held without complying with the mandatory provisions of the statute conveys nothing to the purchaser.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182.

⇐163. —— Purchase by executor or administrator.

Mo. 1881. An administrator who buys property from the estate is properly chargeable with interest on the amount thereof.

Julian v. Wrightsman, 73 Mo. 569.

Mo. 1930. Purchase of personalty by administrator at own sale is voidable at instance of heirs or parties interested.

Ambruster v. Ambruster, 31 S.W.2d 28, 326 Mo. 51, 77 A.L.R. 782.

Administrator purchasing personalty at own sale held title as trustee for interested parties who may elect to ratify sale and hold administrator as trustee.

Ambruster v. Ambruster, 31 S.W.2d 28, 326 Mo. 51, 77 A.L.R. 782.

Adverse claimants, if participating in sale to administrator of personalty at administrator's sale or failing to object within reasonable time, may be held to have ratified sale or to be estopped.

Ambruster v. Ambruster, 31 S.W.2d 28, 326 Mo. 51, 77 A.L.R. 782.

Son knowing of sale of stock from father's estate to mother, acting as administratrix, and not objecting for 10 years, *held* not estopped from claiming interest in stock as heir of father.

Ambruster v. Ambruster, 31 S.W.2d 28, 326 Mo. 51, 77 A.L.R. 782.

⇐164-165.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐166. —— Application of proceeds.

Mo. 1838. A. by his will directed his slaves to be freed at specified periods after his death, and that B., one of the slaves, a female, should be free after serving the executor four years. He then made several specific devises of real estate, and directed his "crop of grain, farming tools, furniture, and stock, to be valued and acted on according to law, and if there should be a residue from hire of negroes, crop, etc., to be given to C." *Held*, that the crops, etc., should be sold, and the proceeds applied in payment of the testator's debts, and not be distributed as in case of intestacy, as otherwise the clause as to the residue would be nugatory; and that the value of a child born to B. before the expiration of the four years should be applied to the payment of the debts of the testator, and thus inure to the benefit of C.

Erwin v. Henry, 5 Mo. 469.

⇐167. —— Title and rights of purchasers.

Mo. 1883. The terms of a public sale of personal property held by administrators provided for a credit of six months without interest the purchaser to give notes with approved security. At the sale property was bid off by plaintiff, who did not comply with the terms, but later had a talk with one of the administrators, and proposed that in lieu of the security the property should be left on the place, with a son of the intestate, as security for the amount of the bid. The property was so left, and subsequently, about two months thereafter, the property was again sold; the purchaser at the sale having failed to pay therefor. *Held*, that the purchaser at the sale had neither the right of property, nor the right to the possession thereof, by virtue of his having bid it off at the sale, because he did not comply with the terms thereof, and he had no such rights by reason of the understanding had after the sale, because no time was agreed on when he was to pay for the property, and his right thereto was dependent on his paying for it within a reasonable time.

Matthews v. McElroy, 79 Mo. 202.

For references to other topics, see Descriptive-Word Index

⇐168. —— Setting aside.

Mo. 1856. A creditor of an intestate's estate sought to set aside a sale and conveyance made by the administrator for the payment of debts on the ground of fraud, the administrator not being a party to the suit. *Held* that, as it did not appear that the suing creditor was the only creditor of the estate, a decree directing the payment to such creditors out of the proceeds of the sale is erroneous, but the proceeds should have been put into the hands of the administrator to be applied according to law under the supervision of the probate court.

Bank of Missouri v. White, 23 Mo. 342, 66 Am.Dec. 671.

Mo.App. 1878. The purchase by a daughter of an executrix of notes executed by testator with money belonging partly to herself and partly to the executrix, with a view to prevent the sacrifice of property in which the executrix had a life estate, and which was mortgaged to secure the notes, and the subsequent foreclosure of the mortgage, was not a fraud in law upon the distributees of the estate of such a character that the sale of the mortgaged property should be set aside.

Payne v. Payne, 5 Mo.App. 188.

⇐169. Mortgage or pledge.

Mo. 1878. 1 Wag.St. p. 89, § 40, which provides that "executors and administrators may assign the notes and bonds of the estate to creditors * * * in discharge of an amount of their claims equal to the amount of such bond or note," did not empower an administrator to assign a note belonging to the estate to defendant in error as collateral to pay a debt to a third person, not then due, evidenced by the joint note of the decedent, defendant in error, and others.

Chandler v. Stevenson, 68 Mo. 450.

Mo. 1900. A negotiable note, secured by a mortgage on real property purchased by an executor for the children of his decedent, having been paid and taken up by the executor as part payment for the land and placed as security for an individual loan to the executor by an irregular indorsement, amounting to a mere assignment, the children may defend against an enforcement of the note and mortgage by showing payment, though not parties to the transaction.

Bishop v. Chase, 56 S.W. 1080, 156 Mo. 158, 79 Am.St.Rep. 515.

⇐170. Indorsement and transfer of bills and notes.

Mo. 1931. In mortgagors' action to cancel notes secured by deed of trust, facts *held* to show sale of notes to defendant by deceased holder's administratrix was authorized by probate court.

Webb v. Salisbury, 39 S.W.2d 1045, 327 Mo. 1123.

Mo.App. 1886. An administrator sold property belonging to the estate, taking notes for the price. Thereafter he bought the property from the purchaser, turning over the notes as payment. *Held*, that the notes were not paid, but that title to them vested in the administrator de bonis non afterwards appointed, and that he might have recovered on them, notwithstanding their surrender.

Cowgill v. Linville, 20 Mo.App. 138.

Under Rev.St. § 212, an administrator has no power to transfer notes taken for property belonging to the estate, except to creditors, legatees, and distributees, in discharge of an amount of their claims equal to the amount of the notes transferred.

Cowgill v. Linville, 20 Mo.App. 138.

Mo.App. 1902. Under a will by which testator bequeathed to his wife the interest of a certain note, and, if paid, a specified interest on a sum equal to the principal so long as she lived, such sum then to be divided among specified legatees, the executor holds such note as trustee, and may sell it and convey a good title thereto by indorsement in blank.

Marshall v. Myers, 70 S.W. 927, 96 Mo. App. 643.

Mo.App. 1911. While Rev.St.1909, § 216, V.A.M.S. § 463.130, providing that administrators shall assign the notes, stock, etc., of the estate to creditors, legatees, and distributees, in discharge of their claim equal to the amount of such bond or note, prohibits the assignment of a note, except in discharge of such claims, it only applies to the assets of the estate, and does not prohibit the assignment by administrators of a note executed to them, as such, in payment of a judgment of the estate, since the legal title to the note vested in the administrators; assets going into the administrators' hands directly from intestate being treated differently from those going into their hands during the course of administration.

Vandeventer v. Florida Savings Bank, 141 S.W. 900, 162 Mo.App. 34.

Mo.App. 1939. Where note payable to bank and duly indorsed in blank by bank cashier was found among papers of decedent's estate after death of bank cashier who was also administrator pendente lite of decedent's estate, the transfer by cashier's indorsement was not invalid, so as to defeat

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estate's claim of possession and ownership, on ground cashier acted in dual capacity so that there was not the requisite two contracting parties.

Wolf v. Wuelling, 130 S.W.2d 671, 233 Mo.App. 1144.

Mo.App. 1946. A foreign administrator cannot maintain an action on note given by Missouri resident to administrator's intestate, nor can administrator indorse such note to third person so as to give indorsee a right of action in his own name.

Pinet v. Pinet, 191 S.W.2d 362, 239 Mo. App. 500.

⇐171. Assignment and transfer of rights of action.

C.C.Mo. 1905. While at common law an administrator or executor may assign, sell, and transfer the choses in action of the estate, yet by statute in Ohio this power is taken away, except as to the sale of desperate claims, and bonds and stocks necessary to be sold to pay debts; and under that statute a purported transfer to the residuary legatee by the executor, on his own motion, and before final settlement and distribution by the court of probate, of a claim for rentals accruing during testator's lifetime, when not within any of the statutory exceptions, is unauthorized, and confers on the transferee no right of action.

Broadwell v. Banks, 134 F. 470.

Mo. 1879. The executor or administrator of an estate has no authority to transfer the debts or evidence of debt due the testator or intestate, except as expressly permitted in the statute. 1 Wag.St. p. 89, § 40.

Well v. Jones, 70 Mo. 560.

Mo.App. 1897. An administrator's claim to indemnity which is essentially for the benefit of a third person may be assigned by the administrator to such person, notwithstanding the provisions of the administration law of 1889. Rev.St.1889, c. 1, art. 9, § 209, V.A.M.S. § 464.130.

Christy v. Chicago, B. & K. C. Ry. Co., 70 Mo.App. 43.

Mo.App. 1926. Bank taking assignment of factor's assets, knowing of consignor's claim of negligence in not selling consigned cotton, was not innocent purchaser for value.

Boatmen's Bank v. Vandiver, 281 S.W. 144.

Creditor bank, taking assignment of cotton factor's assets, took them subject to all existing equities and set-offs when assignment was made.

Boatmen's Bank v. Vandiver, 281 S.W. 144.

⇐172. Property acquired by executor or administrator.

D.C.Mo. 1933. Statute *held* to confer no authority on administrator to take assignments of causes of action. Mo.St.Ann. § 94, p. 57, V.A.M.S. § 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

Right of action, if any, which beneficiary in life policies had against insurer for cancellation while insured was insane, could not be assigned to beneficiary as administratrix of insured's estate. Mo.St.Ann. § 94, p. 57, V. A.M.S. § 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

⇐173. Nature and purpose in general.

Mo. 1882. Wag.St. p. 88, § 33, provides that the widow shall be allowed to keep as her absolute property the family Bible, all grain, meat, vegetables, and groceries, and other provisions on hand, not to exceed the value of $500. *Held*, that such property or the proceeds thereof are not subject to be disposed of by will of the deceased husband.

Hasenritter v. Hasenritter, 77 Mo. 162.

Mo. 1885. The allowance to the widow under Rev.St. § 107, is not given to her for the benefit of herself and her children, or the children of the deceased, but to her for her own use, to be disposed of as she may see proper, and, therefore, she is entitled to it whether there are children of the marriage or not.

Mowser v. Mowser, 87 Mo. 437.

Mo.App. 1911. Bounties, allowed the widow out of the estate of her husband by Rev.St.1909, §§ 114, 115, 116, 117, V.A.M.S. §§ 462.450–462.470, are not a part of the widow's dower, as they belong to her absolutely, and not merely for life.

Martin v. Jones, 134 S.W. 1097, 155 Mo. App. 490.

Mo.App. 1937. Widow's right to absolute property from estate of her husband vests in her immediately on death of husband.

Briscoe v. Merchants & Miners Bank, 102 S.W.2d 751.

Mo.App. 1951. Statute providing for an allowance to widow or widower from estate of deceased spouse for one year's support, and statute providing for allowance of personalty of value of $400, were enacted to provide temporary maintenance for surviving spouse and children, if any, of a decedent

during period immediately follow his or her death and until some permanent provision could be made for their support. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Power to grant statutory allowance to widow or widower of one year's support from estate of deceased spouse, and allowance of personalty of value of $400, is dependent on statutory authority, since at common law there was no provision for supplying temporary wants and requirements for those who had been dependent on the deceased. Mo.R.S.A. §§ 106, 107, V.A.S.M. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Mo.App. 1952. The purpose of statute allowing surviving husband or wife enumerated items and types of personal property, including household furnishings, is to provide temporary maintenance for surviving spouse and minor children under 18 years of age during period immediately following death and until permanent provision can be made for their support. V.A.M.S. § 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐174. Constitutional and statutory provisions.

Mo.App. 1906. Rev.St.1899, § 111 (repealed 1919, p. 99), provides that, if a wife shall die intestate owning personal property in her own name, in addition to curtesy, her widower shall be allowed to keep as his absolute property all the articles and property, and be entitled to all the remedies and reliefs relating to the deceased wife's property as is provided for the widow in the deceased's husband's property under sections 105–107, 109, V.A.M.S. §§ 462.450, 462.460, 462.480. *Held*, that such section had no application to the estate of a wife who died testate.

Black v. Brittain, 92 S.W. 500, 116 Mo. App. 386.

Mo.App. 1913. Statutes entitling minor children to certain allowances out of the estates of their deceased father or mother are highly remedial and are to be construed so as to carry out their spirit and purpose; it being the duty of the court to enlarge or restrain the meaning of the words employed to effectuate the legislative intent.

In re Ryan's Estate, 156 S.W. 759, 174 Mo.App. 202.

Mo.App. 1951. Statute providing for an allowance to widow or widower of one year's support from estate of deceased spouse should be given a liberal construction to effectuate its benign and salutary purpose. Mo.R.S.A. § 106, V.A.M.S. § 462.450.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

⇐175. Quarantine or other occupation or use of property.

Ejectment will lie on behalf of the widow for the dwelling house, messuage, etc., of which her husband died seised before assignment of dower.

Mo. 1829. Stokes v. McAllister, 2 Mo. 163.

Mo. 1871. Miller v. Talley, 48 Mo. 503.

Mo. 1829. Right of a widow to remain in the mansion house may be assigned.

Stokes v. McAllister, 2 Mo. 163.

The act regulating executions, passed July 4, 1825, does not repeal Act Jan. 21, 1815, § 73, giving to widows the right to remain in the mansion houses of their husbands and the plantations thereto belonging until the assignment of dower.

Stokes v. McAllister, 2 Mo. 163.

Act Jan. 25, 1817, providing that, in case of insolvency, the widow shall not be entitled to dower in the lands, but shall be entitled to remain in the mansion house, the plantation of which the husband died seised, rent free, for the term of two years, does not repeal Act Jan. 1815, § 73, giving to widows the right to remain in the mansion house until assignment of dower.

Stokes v. McAllister, 2 Mo. 163.

Under statutes entitling a widow to quarantine in her husband's mansion and messuages, the terms include the rents thereof until assignment of dower.

Mo. 1863. Orrick v. Pratt, 34 Mo. 226.

Mo. 1894. Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

Mo. 1863. Under the statutes entitling a widow to quarantine in her husband's mansion and messuages, the terms include the plantation upon which the mansion is.

Orrick v. Pratt, 34 Mo. 226.

A widow is entitled to enjoy the mansion house and plantation, rent free, until her dower is assigned her, under Rev.Code, 1855, p. 670, §§ 11, 21.

Orrick v. Pratt, 34 Mo. 226.

Mo. 1872. Wag.St. p. 542, § 21, authorizing a widow, until dower is assigned, to remain in the mansion house of her husband, without liability to pay rent, does not authorize her to hold it for any specific length of time.

Whaley v. Whaley, 50 Mo. 577.

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Mo. 1881. Under Rev.St.1879, § 2205, providing that until dower be assigned the widow may remain in and enjoy the mansion house of her husband without paying rent, etc., a widow has no right to the possession, pending the assignment of dower, of a house in which she was not living at the time of her husband's death.

McClurg v. Turner, 74 Mo. 45.

Mo. 1885. Under Rev.St.1855, p. 672, § 21, providing that the widow shall have the right to remain in and enjoy the premises until dower is assigned to her, her right can only be terminated by the assignment of dower.

Roberts v. Nelson, 86 Mo. 21.

Under Rev.St.1855, p. 672, § 21, providing that the widow shall have the right to remain in and enjoy the premises until her dower is assigned, she is entitled to the whole of the rents where there is no outstanding lease at the date of the death of her husband.

Roberts v. Nelson, 86 Mo. 21.

Mo. 1894. A widow is not required to keep up the interest on a mortgage on the mansion-house plantation out of rents received by her therefrom between her husband's death and the assignment of her dower.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

A widow is not estopped to claim rent for the mansion-house plantation, till the assignment of her dower, by the fact that she was paid by the executors who carried on the farming operations, for a year, to superintend the household affairs as to keeping and boarding hands.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

The fact that the widow's possession of the mansion-house farm is detrimental to the best interests of the estate does not affect her right to receive the rents until her dower is assigned.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

The fact that the mansion house is situated on land in which her husband had only a life estate does not affect the widow's right, under Rev.St.1889, § 4533, V.A.M.S. § 469.220, to the rents of the balance of his plantation adjoining it, and used by him in connection therewith, until her dower is assigned.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

A widow may, at the same time, maintain an action for the assignment of her dower and one against the executors for an accounting of the rents of the mansion-house plantation, to which she is entitled till her dower is assigned.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

Rev.St.1889, § 250, V.A.M.S. § 469.230, providing that, until dower is assigned, the court shall order sums to be paid to the widow out of the rents of real estate in proportion to her interest therein, does not apply when the widow is in possession under her quarantine rights.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

The fact that the plantation is in unconnected tracts is immaterial, if it was cultivated by her husband as one farm, by the same implements, and same hands, who were boarded at the mansion house.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

Mo. 1894. Where a dwelling house is destroyed by a cyclone, in which the head of the family is killed, the widow is not personally chargeable with $240 expended for work and materials for a new dwelling on deceased's land, since she has a right to remain on the farm during the continuance of her quarantine, and she and her children are entitled to shelter.

Nelson v. Barnett, 27 S.W. 520, 123 Mo. 564.

Mo. 1897. The widow's right to the use of the mansion house and messuages until dower is assigned, Rev.St.1855, p. 672, § 21, is assignable, and passes by her deed of the lands.

Carey v. West, 40 S.W. 661, 139 Mo. 146.

Mo. 1900. Under Rev.St.1889, § 4533, V.A.M.S. § 469.220, providing that a widow may remain in and enjoy the mansion house of her husband till dower be assigned, without paying rent, the widow is entitled to quarantine, whether she reside in the mansion house or elsewhere at the time of her husband's death.

King v. King, 56 S.W. 534, 155 Mo. 406.

Where a wife claimed quarantine in her deceased husband's mansion house, evidence that she had abandoned the same was not competent to show an abandonment by the husband, and thereby defeat her claim.

King v. King, 56 S.W. 534, 155 Mo. 406.

Mo. 1901. Under Rev.St.1879, § 2205, and Rev.St.1835, p. 229, § 15, providing that, until dower be assigned, the widow may remain in the mansion house of her husband, and the messuages and plantation thereto, belonging, without paying rent for the same,

the widow is entitled to the rents and profits of the plantation in her own right.

Smith v. Stephens, 64 S.W. 260, 164 Mo. 415.

Mo. 1903. A widow's right of quarantine is a possessory right on which an action of ejectment may be maintained or defended, and this right is assignable and carries with it all the incidents that belong to it prior to the transfer.

Phillips v. Presson, 72 S.W. 501, 172 Mo. 24.

Mo. 1903. Where a widow resided on land, owned by her husband, after his death, a conveyance of the land by her operated as a valid grant of the widow's quarantine, which entitled the purchaser to possession until dower was assigned, or during the widow's life at the pleasure of the remaindermen.

Graham v. Stafford, 72 S.W. 507, 171 Mo. 692.

Where, after her husband's death, his widow conveyed her quarantine in the house and plantation on which they had lived, the fact that remaindermen did not terminate the purchaser's rights by having dower assigned, and did not assert ownership of the land for 50 years after the husband's death, during which the widow still lived, did not constitute such laches as precluded them from recovering the land after the widow's death.

Graham v. Stafford, 72 S.W. 507, 171 Mo. 692.

Mo. 1903. A husband purchased land subject to trust deeds, and subsequently purchased 17 acres adjoining, which was unincumbered land, establishing his home on the plantation, and using the whole as his farm. After his death his executor sold both tracts, and paid off the trust deeds; the balance of the proceeds going to the assets of the estate and being used to pay the debts of the deceased. *Held*, that the widow, being entitled to dower, was entitled to quarantine in the mansion house and plantation, which embraced all the land, until dower was assigned to her.

Casteel v. Potter, 75 S.W. 597, 176 Mo. 76.

Mo. 1914. Though a life tenant is usually required to pay taxes, one holding under the widow's quarantine is not chargeable with taxes, nor required to account for rents.

Shoultz v. Lee, 168 S.W. 1146, 260 Mo. 719.

Mo. 1920. Under Rev.St.1909, § 366, V.A.M.S. § 469.220, allowing a widow to enjoy the mansion house until dower is assigned, she may retain possession thereof or may convey it notwithstanding her remarriage, and she or her grantee may maintain or defeat ejectment by virtue of that right.

Wetzel v. Hecht, 220 S.W. 888, 281 Mo. 610.

Mo. 1920. The husband must have a mansion at his death, upon his land, in order that widow's quarantine may apply thereto and it is not sufficient that the husband owned the land and the widow had dower therein and subsequently erected a mansion house, and where the mansion was destroyed, remodeling a remaining smokehouse into a dwelling will not suffice.

Deck v. Wofford, 222 S.W. 443, 282 Mo. 564.

Mo. 1921. The widow's right of quarantine under Rev.St.1889, § 4533, V.A.M.S. § 469.220, authorizing her to remain in possession until dower be assigned, is an incident to the right to have dower assigned, and disappears when that right ceases.

C. M. Smith Bros. Land & Investment Co. v. Phillips, 233 S.W. 413, 289 Mo. 579.

Mo. 1931. Widow's quarantine right covered land purchased by husband and used as one farm with land on which dwelling stood, until dower and homestead were assigned or extinguished.

Moore v. Hoffman, 39 S.W.2d 339, 327 Mo. 852, 75 A.L.R. 135.

Widow's right of quarantine is incident of dower and is lost when right to dower expires by limitation. Rev.St.1919, §§ 334, 359, V.A.M.S. §§ 469.220, 469.470.

Moore v. Hoffman, 39 S.W.2d 339, 327 Mo. 852, 75 A.L.R. 135.

Mo. 1936. Widow is not chargeable with taxes on land or interest on debt secured by land during continuance of right of quarantine. Mo.St.Ann. §§ 321, 338, pp. 207, 224, V.A.M.S. §§ 469.090, 469.260.

Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

Mo. 1952. Where no dower had been assigned to widow, she had quarantine right in tract owned by her husband, and had exclusive right to use such tract and tract which had been held as an estate by the entirety during her life.

Henry v. Steward, 250 S.W.2d 527.

Mo.App. 1889. An owner of land made a parol agreement renting it for less than a year for a share of the crop to be raised thereon, but died before the lessees took possession. *Held*, that until entry by the lessees the whole estate and right of possession remained in the lessor, so that the widow was entitled to her statutory quarantine rights in the entire estate.

Tincher v. Phillips, 37 Mo.App. 621.

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Mo.App. 1928. Widow in exercising quarantine right need not pay interest on mortgage incumbering property nor pay taxes. Rev.St.1919, § 334, V.A.M.S. § 469.220.
Krug v. Bremer, 11 S.W.2d 1096.

Defendants depriving widow of right of quarantine in decedent's premises *held* liable for reasonable rental value thereof. Rev.St. 1919, § 334, V.A.M.S. § 469.220.
Krug v. Bremer, 11 S.W.2d 1096.

General judgment against defendants in suit for rent during period when widow's right of quarantine was in force *held* proper. Rev.St.1919, § 334, V.A.M.S. § 469.220.
Krug v. Bremer, 11 S.W.2d 1096.

Mo.App. 1930. That farm was not contiguous to town lots on which deceased husband's residence was located would not, of itself, deprive widow of quarantine right. Rev.St.1919, § 334, V.A.M.S. § 469.220.
Prouty v. Hall, 31 S.W.2d 103.

Whether farm was part of "messuages or plantation thereto belonging" to town lots on which deceased husband resided, depended on use of farm, as regards widow's quarantine right. Rev.St.1919, § 334. V.A.M.S. § 469.220.
Prouty v. Hall, 31 S.W.2d 103.

Statutory provision for widow's quarantine is to be liberally construed for protection of widow. Rev.St.1919, § 334, V.A.M.S. § 469.220.
Prouty v. Hall, 31 S.W.2d 103.

⇐176. Maintenance and support.

Mo. 1892. An administrator is entitled, on his final accounting, to credit for money paid by him for the schooling and clothes of his intestate's daughter, where such payments were made during the intestate's lifetime, and were not intended as a gift, and where the claim therefor, though not formally allowed in the probate court, was included in a settlement approved by that court.
McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo. 1898. Under Rev.St.1879, § 255, providing that the probate clerk may allow for such support of a minor child of intestate not otherwise provided for as will not prejudice the rights of creditors, such allowance to be treated as a distribution to the minor, and administrator cannot recover for expenses incurred for such minor where the estate is insolvent, the expenses charged to the whole estate, and the court had never made any order of allowance.
Clark v. Bettelheim, 46 S.W. 135, 144 Mo. 258.

Mo.App. 1896. Under Rev.St.1889, § 106, V.A.M.S. § 462.450, the widow is only entitled to an appropriation out of the assets of her husband's estate to cover a deficiency in grain, meat, vegetables, groceries, and other provisions, and such allowance should not include compensation for the want of any other articles allowed her as absolute property under section 105.
See v. See, 66 Mo.App. 566.

Mo.App. 1913. Under Rev.St.1909, §§ 114, 115, 120, V.A.M.S. § 462.450, *held* that the husband was entitled to an allowance for provisions which were not on hand.
Nelson v. Troll, 156 S.W. 16, 173 Mo. App. 51.

Mo.App. 1941. While statutes providing for allowances to decedent's widow and minor children out of his personal estate are highly remedial and must be given most liberal construction possible in order to effectuate their benign and salutary purpose, such rule does not warrant nor permit construction contrary to plain and unambiguous language thereof. Rev.St.1939, §§ 106, 107, 110 Mo.St. Ann. §§ 107, 108, 111, pp. 69, 70, 73, V.A.M.S. §§ 462.450, 462.460, 462.490.
Jaeglin v. Moakley, 151 S.W.2d 524, 236 Mo.App. 254.

Mo.App. 1942. The apparent intent of Legislature in allowing surviving wife or husband certain household effects and articles of food was to provide a temporary support for surviving spouse and family. Rev. St.1939, §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.
In re Wahl's Estate, 158 S.W.2d 743, 236 Mo.App. 345.

Under statutes giving widow in addition to dower certain household effects, it was intended to give the widow an allowance as her absolute property for the purpose of her temporary support and maintenance independent of and unrestricted by any other right or interest she had in the property of the deceased. Rev.St.1939, §§ 106, 107, V.A. M.S. §§ 462.450, 462.460.
In re Wahl's Estate, 158 S.W.2d 743, 236 Mo.App. 345.

⇐177. Specific articles.

Mo. 1939. The apparent intent of Legislature in allowing surviving wife or husband certain household effects and articles of food was to provide a temporary support for surviving spouse and family. Mo.St.Ann. §§ 106–111, pp. 67–73, V.A.M.S. §§ 462.450–462.490, 463.010.
In re Bernays' Estate, 126 S.W.2d 209, 344 Mo. 135, 122 A.L.R. 169.

Mo.App. 1913. Under Rev.St.1909, §§ 114, 115, 120, V.A.M.S. § 462.450, *held* that, where a wife had household furniture, the husband was entitled to an absolute allowance thereof not exceeding $500.

Nelson v. Troll, 156 S.W. 16, 173 Mo.App. 51.

Mo.App. 1942. Under statute entitling widow to keep as her absolute property family Bible and other books not to exceed $200 and furniture not to exceed value of $500, widow is not entitled to $200 cash allowance in lieu of family Bible and other books and $500 cash allowance in lieu of furniture, where such articles are not in existence. Mo. R.S.A. § 106, V.A.M.S. § 462.450.

In re Evans' Estate, 165 S.W.2d 705, 237 Mo.App. 247.

⇐178. Amount or value.

Mo.App. 1913. Under Rev.St.1909, § 119, V.A.M.S. § 462.490, providing that when a widow dies leaving minor children they shall be entitled to the same allowances as she was entitled to take at the death of her husband, such children are entitled to those rights in the estate of the deceased mother without regard to her interest in the estate of her deceased husband.

In re Ryan's Estate, 156 S.W. 759, 174 Mo.App. 202.

Mo.App. 1922. What constitutes a reasonable allowance to a widow under Rev.St. 1919, § 106, V.A.M.S. § 462.450, is a matter largely within the discretion of the court, guided by the circumstances in the case.

Mahon v. Fletcher's Estate, 245 S.W. 372.

Mo.App. 1923. Where widow of a fairly prosperous man was helpless, and required attention day and night of two daughters as nurses, and it was necessary that a cook be provided for the household, which included the husband of one of the daughters, an allowance of $1,500 under Rev.St.1919, §§ 105–107, V.A.M.S. §§ 462.450, 462.460, in lieu of grain and provisions for support of the widow and her family for twelve months, was a reasonable appropriation.

In re Rash's Estate, 256 S.W. 525.

Mo.App. 1932. That allowances to widower from deceased wife's estate would take two-thirds of estate *held* immaterial. Rev. St.1929, §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

Nidy v. Rice, 44 S.W.2d 196, 226 Mo.App. 610.

Mo.App. 1934. Allowance of $900 to widower as year's provision *held* not abuse of discretion. Mo.St.Ann. §§ 106, 107, pp. 67, 69, V.A.M.S. § 462.450.

In re Flynn's Estate, 67 S.W.2d 771, 228 Mo.App. 1197.

Mo.App. 1934. Granting widower of testatrix statutory $400 allowance *held* proper. Mo.St.Ann. § 108, p. 70, V.A.M.S. § 462.460.

In re Flynn's Estate, 67 S.W.2d 776.

Mo.App. 1936. Where administrators of widower applied for statutory allowances before personalty of predeceased wife had been distributed or sold and articles enumerated by statute were deficient, administrators were entitled to allowance of year's maintenance in addition to allowance of absolute property. Mo.St.Ann. §§ 106, 107, 284, 324, 585, pp. 67, 69, 177, 210, 362, V.A.M.S. §§ 145.150, 462.450, 467.010, 469.130.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Mo.App. 1949. Statute providing that widower or widow may take such personalty of deceased that he or she may choose not to exceed appraised value of $400, contemplates that the appraised value is a fair and reasonable estimate of the real value. Mo.R.S.A. § 107, V.A.M.S. § 462.460.

State ex rel. Meyer v. Arnold, 220 S.W.2d 942.

Mo.App. 1951. In determining allowance to be made to widow or widower under statute providing for an allowance of one year's support from estate of deceased spouse, courts must take into consideration all proper circumstances and conditions surrounding the surviving spouse at time of the allowance. Mo.R.S.A. § 106, V.A.M.S. § 462.450.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

In passing on reasonableness of allowance of one year's statutory support to widow or widower from estate of deceased spouse, a probate court's view of necessities for succeeding 12 months must necessarily be prospective, not retrospective. Mo.R.S.A. § 106, V.A.M.S. § 462.450.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Provision in statute giving widow or widower allowance of one year's reasonable support out of estate of deceased spouse, to effect that court should take into account the condition of the estate of the deceased spouse, was not intended to limit amount of allowance according to value of estate of deceased spouse, but was merely a factor to be considered. Mo.R.S.A. § 106, V.A.M.S. § 462.450.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Mo.App. 1952. Surviving husband had no right to appropriate as his absolute property household furnishings which had belonged to his deceased wife in absence of a finding by probate court that such furnishings did not exceed the value of $500. V.A.M.S. §§ 462.010, 462.020, 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐179. Additional to dower or other interest.

Mo. 1926. Widow's "right of quarantine," being separate from right of statutory homestead and being an incident of dower, is entirely unaffected by intervention of homestead estate. Rev.St.1879, § 2205.

Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442.

Mo.App. 1913. Under Rev.St.1909, § 120 (repealed 1919, p. 99), providing that a widower shall, in addition to curtesy, be allowed to keep, as his absolute property, all of the property provided for a widow out of her husband's estate, a widower can take, regardless of the birth of issue.

Nelson v. Troll, 156 S.W. 16, following Ferguson's Estate v. Gentry, 104 S.W. 108, 206 Mo. 203.

Mo.App. 1934. Will giving widower life estate in trust property amounting to less than $18,000 in value *held* not to deprive widower of statutory allowances. Mo.St.Ann. §§ 106–108, pp. 67, 69, 70, V.A.M.S. §§ 462.450–462.470.

In re Flynn's Estate, 67 S.W.2d 771, 228 Mo.App. 1197.

⇐180. Persons entitled.

Mo. 1872. The word "family," as used in Wag.St. p. 88, §§ 33, 34, providing for an allowance for a widow and her family, means children or those persons who have a legal or moral right to be clothed and fed by the widow, and does not include assistants necessary to manage the farm.

Whaley v. Whaley, 50 Mo. 577.

Mo.App. 1886. The widow of a person domiciled in Illinois and dying in that state is not entitled to an allowance out of his personal estate in Missouri, under Rev.St. §§ 106–109, those sections having no relation to nonresident decedents.

Richardson v. Lewis, 21 Mo.App. 531.

Mo.App. 1891. Rev.St.1889, § 110, V.A.M.S. § 462.490, providing that, in case of the death of a father leaving no widow, or in case of the death of a widow, minor children under 16 years of age shall be entitled to the property and allowances to which a surviving widow is entitled, does not entitle the children of a deceased woman whose husband survives her to such allowances.

Baer v. Pfaff, 44 Mo.App. 35.

Mo.App. 1896. The year's provisions allowed to the widow is her absolute property, and if it be not on hand, the money in lieu thereof is hers as her absolute property, not depending upon her place of residence after her husband's death. And in a proceeding for an allowance it cannot be objected that the widow became a nonresident of the state immediately after her husband's death.

Campbell v. Whitsett, 66 Mo.App. 444.

Mo.App. 1913. Under Rev.St.1909, §§ 114, 115, 116, and 119, V.A.M.S. §§ 462.450, 462.460, providing for a widow's allowance and for allowances to minor children of a deceased widow, section 120 (repealed 1919, p. 99), defining a widower's rights in the estate of his deceased wife, and section 8057 V.A.M.S. §§ 1.020 et seq., 80.010 prescribing a rule of construction, *held*, that while the deceased, a divorced woman whose husband was then living, was not a "widow," yet her minor son was entitled to the same allowances as if she had been a widow.

In re Ryan's Estate, 156 S.W. 759, 174 Mo.App. 202.

Rev.St.1909, § 119, V.A.M.S. § 462.490, entitling minor children of a deceased widow to the same allowances as she was entitled to take, *held* an exemption statute designed to provide a sure support for such minors, and the legislative knowledge of the fact that a divorced woman remaining unmarried until death might be the head of the family with respect to minor children might be considered.

In re Ryan's Estate, 156 S.W. 759, 174 Mo.App. 202.

Mo.App. 1923. Under Rev.St.1919, §§ 105–107, V.A.M.S. §§ 462.450, 462.460, providing that widow shall have grain, provisions, etc., necessary for sustenance of her and "family" for 12 months, where widow was helpless, and required constant attention day and night, and it became necessary to employ two daughters as nurses, and to procure the service of one it was necessary to furnish board and lodging for her husband, the daughters and the husband were members of the "family."

In re Rash's Estate, 256 S.W. 525.

Mo.App. 1932. Widower *held* entitled to allowance from deceased wife's estate notwithstanding no family survived widow. Rev.St.1929, §§ 106, 107, V.A.M.S. § 462.450.

Nidy v. Rice, 44 S.W.2d 196, 226 Mo.App. 610.

For references to other topics, see Descriptive-Word Index

Mo.App. 1941. The probate court's power to grant allowances for support of decedent's surviving spouse and minor children pending administration of his estate depends on statutes, as common law made no provision for supplying temporary wants and requirements of decedent's dependents. Rev. St.1939, §§ 106, 107, 110, Mo.St.Ann. §§ 107, 108, 111, pp. 69, 70, 73, V.A.M.S. §§ 462.450, 462.460, 462.490.

Jaeglin v. Moakley, 151 S.W.2d 524, 236 Mo.App. 254.

Temporary allowances out of decedents' estate to surviving widows and children are generally granted only to widows and children residing within states of decedents' domiciles at times of decedents' deaths, and probate court of state has no jurisdiction to grant allowance to nonresident decedent's widow from assets, on which there is ancillary administration, within its jurisdiction. Rev.St.1939, §§ 106, 107, 110, Mo.St.Ann. §§ 107, 108, 111, pp. 69, 70, 73, V.A.M.S. §§ 462.450, 462.460, 462.490.

Jaeglin v. Moakley, 151 S.W.2d 524, 236 Mo.App. 254.

The minor children of nonresident decedent, whose wife predeceased him, are not entitled to statutory allowances by probate court out of estate's property subject to ancillary administration in state, as wife would not have been entitled to such allowances had she survived decedent. Rev.St.1939, §§ 106, 107, 110, Mo.St.Ann. §§ 107, 108, 111, pp. 69, 70, 73, V.A.M.S. §§ 462.450, 462.460, 462.490.

Jaeglin v. Moakley, 151 S.W.2d 524, 236 Mo.App. 254.

⇐181. Property subject to allowance.

Mo. 1873. When a widow claims her allowance under the statute, she may have notes due to her husband appraised to her for that amount.

Cummings v. Cummings, 51 Mo. 261.

Mo. 1875. The probate court, pursuant to the supposed authority of Wag.St. p. 113, art. 6, § 15, ordered the administrator of a decedent to turn over to the widow certain real estate. The widow, assuming that the order conveyed to her an absolute title, sold the land. *Held*, that a grantee of the heirs of the decedent acquired title as against the widow and her grantee.

Pidcock v. Buffam, 61 Mo. 370.

Wag.St. p. 113, art. 6, § 15, providing that, when it appears to the court that the whole amount of the estate of the decedent is not more than that to which the widow is entitled by law, and that there are no debts due from the estate, the court may make an order that the estate be delivered to the widow, does not apply to real estate.

Pidcock v. Buffam, 61 Mo. 370.

Mo. 1880. A decedent died childless, leaving a widow. *Held*, that the widow, under Wag.St. p. 88, § 33, was entitled to claim a sewing machine belonging to the estate of the decedent.

State ex rel. Steers v. Taylor, 72 Mo. 656.

Mo. 1881. Partnership assets must first be applied to payment of partnership debts, and until they are paid neither the widow of an individual partner nor the individual creditors have any claim on them.

Julian v. Wrightsman, 73 Mo. 569.

Mo.App. 1879. Wag.St. p. 88, § 35, provides that, in addition to certain enumerated articles of personal property, the widow of a decedent may take such personal property as she may choose, not to exceed the appraised value of $400. Section 36 provides that the widow shall apply for the property named in section 35, before the same shall be distributed or sold, and it shall be deducted from her dower in the personal estate, if there be any. *Held*, that the provisions for the widow contained in these two sections of the statute are to be taken from the personal estate only, and cannot be taken from the proceeds of land sold by the administrator.

In re Motier's Estate, 7 Mo.App. 514.

Mo.App. 1885. Rev.St.1879, § 110, provides that, "in case of the death of a father, leaving no widow, but minor children under 16 years of age, such minor children shall be entitled absolutely to the property and allowances that the wife would have been entitled to, under the provisions of this chapter, if she had survived her husband, and in case a widow shall die leaving minor children under 16 years of age, they shall be entitled to the same property and allowances absolutely as the mother was entitled to take at the death of her husband." *Held* that, where the widow died a couple of months after her husband, the children are entitled to an allowance out of the widow's estate, though both the estate of the husband and that of the widow are being administered at the same time by a public administrator.

Lewis v. Castello, 17 Mo.App. 593.

In such case it is immaterial that the widow has not received her dower or allowance out of her husband's estate prior to her death, since the allowance proceeds from the mother's estate, irrespective of the manner in which that estate was acquired by her.

Lewis v. Castello, 17 Mo.App. 593.

Mo.App. 1890. Where land of a deceased person is sold under a deed of trust given

by him, no portion of the surplus remaining after payment of the debt secured can be taken to make up a deficiency in the amount of personalty allowed to his widow under Rev. St.1879, §§ 107, 108, 109, giving the widow of decedent $400 worth of personal property.

Jewell v. Knettle, 39 Mo.App. 262.

Mo.App. 1891. The proceeds of the sale of lands of a decedent, whether sold under the terms of a deed of trust executed during the lifetime of the decedent, or sold by order of court to pay debts, go to the heirs subject to the payment of the debts, and cannot be used to make good a deficiency in the widow's allowance, under Rev.St.1879, § 107, et seq.

In re Lloyd's Estate, 44 Mo.App. 670.

Mo.App. 1901. Allowance to minor children can only be appropriated out of the personal assets, and cannot be made good from the proceeds of land sales when the personalty is deficient.

Elstroth v. Young, 88 Mo.App. 418.

Mo.App. 1911. Decedent's widow should not be deprived of her statutory exemption pension provided by act of Congress to be paid where a railway clerk is killed on duty, because technically a widow has no exemptions except in the personal estate owned by decedent existing at his death, and should be allowed out of such fund $400, given her under Rev.St.1899, § 107, Ann.St.1906, p. 373, V.A.M.S. § 462.460, providing that a widow may choose from the deceased husband's personalty, not to exceed the value of $400, in addition to the allowance of $500, under section 105 (page 372), permitting a widow to select $500 worth of articles from decedent's personalty, and should be recompensed from such fund for the reasonable funeral expenses incurred, not to exceed the sum actually paid by her; such expenses not being debts of decedent.

Wolfe v. Wolfe, 134 S.W. 33, 154 Mo.App. 218.

Mo.App. 1911. The rents from realty willed to testator's children are not subject to the widow's allowance.

Lamar v. Belcher, 136 S.W. 748, 154 Mo. App. 571.

Mo.App. 1919. Allowance to widow for her year's support authorized by Rev.St.1909, § 114, V.A.M.S. § 462.450, and the absolute property allowed a widow by section 116, V.A.M.S. § 462.460, must come out of the personalty, and if the widow postpones her application for allowance until administrator or executor has paid out the personalty for debts, she cannot be subsequently paid out of other property.

Peugh v. McKinney, 211 S.W. 83.

The hay and corn matured and gathered prior to testator's death was "personalty," subject to widow's statutory allowances, although in one sense the proceeds of realty.

Peugh v. McKinney, 211 S.W. 83.

Mo.App. 1926. Allowance of sum to widower in lieu of provision out of proceeds of sale of real estate *held* erroneous. Rev.St. 1919, §§ 105–107, 109, V.A.M.S. §§ 462.450, 462.460, 462.480.

In re Wickard's Estate, 282 S.W. 173.

Mo.App. 1930. Where, after insured's death, household furniture was destroyed by fire and insurance paid to administrator, widow *held* entitled to receive $500. Rev.St.1919, §§ 105, 109, V.A.M.S. §§ 462.450, 462.480.

Williams v. Davis, 27 S.W.2d 1064, 224 Mo.App. 481.

⇐182. Priority over other claims.

Mo. 1939. A wife's interest in husband's personalty can be disposed of by husband during his life, unless in expectation of death and with a purpose to defeat wife's interest, and except for absolute allowances provided by statute for widow, and is subject to payment of husband's debts. Mo.St.Ann. §§ 106–111, pp. 67–73, V.A.M.S. §§ 462.450–462.490.

In re Bernays' Estate, 126 S.W.2d 209, 344 Mo. 135, 122 A.L.R. 169.

Mo.App. 1910. Rev.St.1899, § 107, Ann. St.1906, p. 373, V.A.M.S. § 462.460, allows the widow $400 of her husband's estate. Section 108 V.A.M.S. § 462.470, provides that the property delivered to her shall in no case be liable for the payment of decedent's debts. Section 3170 V.A.M.S. § 513.140, provides that personal property shall be subject to execution on a judgment against the purchaser for the price, and shall not be exempt therefrom, except in the hands of an innocent purchaser. Sections 122 and 123 V.A.M.S. §§ 462.210, 462.220, provide that if any of a decedent's personalty be bound by an execution lien at his death, whether levied on or not, the executor shall include it in his inventory, and have it separately appraised, and the probate court may require it to be redeemed, and section 124 V.A.M.S. §§ 462.230, provides that the two preceding sections shall not be so construed as to deprive the widow and minor children of the benefit of the preceding section of the chapter. *Held*, that a widow was not, under section 107, § 462.460, entitled to take personalty free from a vendor's claim for the unpaid part of the price, and sections 122 and 123, V.A.M.S. §§ 462.210, 462.220, do not exempt her from such liability, but refer merely to execution liens for ordinary debts.

Lazonby v. Smithey, 131 S.W. 708, 151 Mo.App. 285.

Mo.App. 1912. Rev.St.1909, § 114, V.A.M.S. § 462.450, allowing a widow to keep provisions, etc., *held* on the same footing as dower, free from the debts and liabilities of the husband.

Lowe v. Lowe, 146 S.W. 100, 163 Mo.App. 209.

Mo.App. 1913. In view of Rev.St.1909, § 118, V.A.M.S. § 462.480, *held* that, under sections 114, 120, V.A.M.S. § 462.450, a husband was entitled to an allowance of $400 out of the proceeds of the sale of his wife's personalty, even though the appraised value of such personalty was not sufficient to discharge that obligation and his other absolute allowances.

Nelson v. Troll, 156 S.W. 16, 173 Mo.App. 51.

Mo.App. 1913. Under Rev.St.1909, §§ 114–116, 118, and Administration Law (Rev. St.1909) § 10, a widow is entitled to her statutory allowance before payment of expenses of litigation by the administrator in an attempt to defeat her rights.

In re Ulrici's Estate, 160 S.W. 812, 177 Mo.App. 584.

Mo.App. 1918. Expenses of last sickness and funeral cannot be deducted from amount of personalty of deceased wife to exclusion or diminution of claim of widower for the $400 allowed under Rev.St.1909, § 116, V.A.M.S. § 462.460.

Brown v. Keen, 201 S.W. 621.

Right of surviving husband that $400 allowance from his wife's personalty, given by Rev.St.1909, § 116, V.A.M.S. § 462.460, be undiminished by payment of expenses of her last sickness or funeral, is not affected by his liability for expenses of her last sickness.

Brown v. Keen, 201 S.W. 621.

Mo.App. 1929. Widow's claim of absolute property in benefit payable under membership in stock exchange is superior to rights of creditors.

South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W. 2d 722, 223 Mo.App. 623, 224 Mo.App. 40.

⇐183. Bar, waiver, or relinquishment.

⇐184. —— In general.

Mo. 1855. Under article 2 of the administration law of 1845 (Rev.St.1845, p. 77) a widow has a right to $200 worth of property immediately after the death of the husband; and where personal property is sold for money, and the widow dies without receiving it, it must be paid to her administrator, though there may be debts of the husband remaining unpaid.

Hastings v. Myers' Adm'r, 21 Mo. 519.

Mo.App. 1905. Under Rev.St.1899, § 2944, V.A.M.S. § 469.080, providing that, when the husband shall die leaving a child or children or other descendants, the widow, if she has a child or children by such husband living, may, in lieu of dower of the one-third part of the lands for life, elect to be endowed absolutely in a share of such lands equal to the share of a child of such deceased husband, the "share of the child" referred to means its share in the real estate, not its interest in the personalty, and the widow's exercise of her election to take a child's portion does not affect her right to the bounty provided by section 107, V.A.M.S. § 462.460, when it is applied for in the time prescribed by section 108.

Hill v. Evans, 91 S.W. 1022, 114 Mo.App. 715.

Mo.App. 1937. Widow had right to waive her claim to, or assign her interest in, money on deposit in bank for purpose of applying money on funeral expenses of deceased husband without any order or authority from probate court. Mo.St.Ann. § 106, p. 67, V.A.M.S. § 462.450.

Briscoe v. Merchants & Miners Bank, 102 S.W.2d 751.

⇐185. —— Antenuptial or postnuptial agreement.

Mo. 1885. In a proceeding by a widow for an allowance under Rev.St. § 107, it was proper to exclude testimony as to a parol agreement between the widow and her husband, prior to the marriage, that on the death of either the other should not claim any interest in the estate of the deceased; the widow having received nothing as a consideration for the alleged agreement.

Mowser v. Mowser, 87 Mo. 437.

Mo.App. 1912. In absence of express language, *held*, that an antenuptial agreement did not include the wife's absolute right to provisions and subsistence for one year out of the estate of her husband.

Lowe v. Lowe, 146 S.W. 100, 163 Mo.App. 209.

Mo.App. 1918. Antenuptial contract between aged parties, whereby wife relinquished rights in her husband's estate, except $2,500 stipulated to be paid her, did not bar her right, after husband's death, to her bounties, as provided by Rev.St.1909, §§ 114–116, V.A.M.S. §§ 462.450, 462.460.

Lawrence v. Lawrence, 208 S.W. 496.

Mo.App. 1926. Wife *held* not precluded from rescinding property settlement contract and asking allowance from husband's estate by failure to return property, where she turned over part of it to him and received

nothing for it, and there was no proof that she ever received rest or as to whom it belonged.

In re Means' Estate, 284 S.W. 186.

Mo.App. 1928. Widow will not be deprived of statutory bounties under antenuptial contract not expressly so providing, nor unmistakably showing such intent. Rev.St. 1919, §§ 105, 106, 330, V.A.M.S. §§ 462.450, 469.160.

Williams v. Schneider, 1 S.W.2d 230.

Antenuptial contract to accept stated sum, in lieu of dower or other interests in husband's estate, *held* not to bar widow's right to allowance for year's sustenance. Rev.St.1919, §§ 105, 106, 330, V.A.M.S. §§ 462.450, 469.160.

Williams v. Schneider, 1 S.W.2d 230.

Mo.App. 1928. Antenuptial contract to accept stated sum, in lieu of dower or other interests in husband's estate, *held* not to bar widow's rights to absolute property allowance. Rev.St.1919, §§ 107, 330, V.A.M.S. §§ 462.460, 469.160.

Williams v. Schneider, 1 S.W.2d 232, first case.

Mo.App. 1928. Election between statutory bounties and marriage contract provisions, in lieu of dower, *held* not required.

Williams v. Schneider, 1 S.W.2d 232, second case.

Mo.App. 1934. Before widow can be deprived of statutory bounties by virtue of antenuptial agreement, such agreement must expressly so provide, and must unmistakably show such intention.

Broyles v. Magee, 71 S.W.2d 149.

Antenuptial agreement for husband's payment of money to wife from his estate after death *held* not "jointure" constituting bar to allowances to which she was entitled as widow. Mo.St.Ann. §§ 334, 2986–2988, pp. 221, 5045–5047, V.A.M.S. §§ 451.220–451.240, 469.160.

Broyles v. Magee, 71 S.W.2d 149.

Mo.App. 1936. Antenuptial contract, in which widow and husband had agreed that neither of them should acquire any interest in property of other by their marriage, did not deprive widow of claims, under widow's bounties statutes, for $300 for a year's support and $400 worth of personal property against husband's estate. Mo.St.Ann. §§ 106–110, pp. 67, 69, 70, 72, V.A.M.S. §§ 462.450–462.480.

Cavener v. Cavener's Estate, 95 S.W.2d 341.

Mo.App. 1950. A postnuptial contract whereby husband arranged for purchase of residence property with his own funds and accepted deed conveying property into an estate by the entirety, so that the property vested absolutely in wife upon his death in consideration for wife's waiver of marital rights to two farm tracts to be left to husband's children by former marriage was based on mutual consideration, and wife was estopped by her contract from making claim after husband's death to widow's allowance and support out of husband's estate.

Clark v. Clark, 228 S.W.2d 828.

⇐186. —— Testamentary provisions.

Mo. 1873. If a widow elects not to take under the will, but to be endowed in her husband's estate, under Wag.St. p. 530, § 5, but subject to the payment of his debts as section 7 following expressly provides, she, as a distributee, must wait the final settlement and adjustment of the estate, and she is not entitled to the allowance of $400 provided by Id. p. 88, §§ 35–37.

Griffith v. Canning, 54 Mo. 282.

Mo.App. 1890. Rev.St.1879, § 2205, provides that, until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereunto belonging, without being liable to pay any rent for the same. *Held*, that a widow who elects to take an undivided share of her husband's estate, under his will, will not be entitled to the widow's quarantine under said statute.

Tyler v. Cartwright, 40 Mo.App. 378.

Mo.App. 1901. Notwithstanding a widow's acceptance of her husband's will, she is entitled to the statutory allowance of personal property to the value of $400, which, pursuant to Rev.St.1899, § 108, V.A.M.S. § 462.470, is to be deducted from her dower in the personal estate, if there be any.

Glenn v. Gunn, 88 Mo.App. 423.

Mo.App. 1901. The widow is entitled to the benefit of the statutory provision for a year's support for herself and children, pursuant to Rev.St.1899, § 105, V.A.M.S. § 462.-450, notwithstanding the acceptance of the decedent's will.

Glenn v. Gunn, 88 Mo.App. 442.

Mo.App. 1912. A husband cannot, without the consent of the wife, dispose of the provisions, etc., allowed to the wife on his death, under Rev.St.1909, § 114, V.A.M.S. § 462.450.

Lowe v. Lowe, 146 S.W. 100, 163 Mo. App. 209.

Mo.App. 1934. Will, to deprive widower of statutory allowances, must contain express provision that benefits set out therein shall

be in lieu of such allowances. Mo.St.Ann. §§ 106–108, pp. 67, 69, 70, V.A.M.S. §§ 462.450, 462.460.

In re Flynn's Estate, 67 S.W.2d 771, 228 Mo.App. 1197.

⇐187. —— Separate estate or homestead.

Mo. 1921. Where the entire estate left by a deceased husband and father was less than the homestead under the Homestead Act of 1895, Rev.St.1899, § 3620, V.A.M.S. § 513.495, the possession of the land by the widow and children as the homestead does not affect the right of the widow to quarantine and dower after the homestead is terminated by her remarriage.

C. M. Smith Bros. Land & Investment Co. v. Phillips, 233 S.W. 413, 289 Mo. 579.

⇐188. —— Misconduct, separation, or divorce.

Mo. 1852. The twenty-ninth and thirtieth sections of the administration act of 1845, making allowances to widows, do not apply to a woman who has been divorced from her husband.

Dobson's Adm'r v. Butler's Adm'r, 17 Mo. 87.

Mo. 1885. The abandonment of a husband by a wife does not impair her right to the provisions under Rev.St. § 107, which provides that the widow in addition to the other allowances may take such personal property as she may choose, not to exceed the appraised value of $400.

Mowser v. Mowser, 87 Mo. 437.

Mo.App. 1896. Under Rev.St.1889, §§ 105, 106, V.A.M.S. § 462.450, providing that in addition to dower the widow shall be allowed a year's support from her husband's estate, a wife who is living apart from her husband without legal cause or excuse is nevertheless entitled to the year's support.

King v. King's Ex'r, 64 Mo.App. 301.

Mo.App. 1900. Where the legal residence of plaintiff's husband at the time of his death was in Missouri, even though at the time plaintiff lived in Nebraska, separate and apart from her husband, the laws of Missouri must control in the distribution of decedent's personal property, since there is no qualification in the statutes that the wife must, in fact, be living or residing in this state at the death of her husband.

Comerford v. Coulter, 82 Mo.App. 362.

Mo.App. 1903. Rev.St.1899, § 2954, V.A.M.S. § 469.220, provides that, until dower be assigned, a widow may remain in and enjoy the mansion house of her husband without being liable to pay rent therefor. Section 2953, V.A.M.S. § 469.210, provides that if wife voluntarily leave her husband, and go away and continue with an adulterer, she shall be barred from her jointure or dower, unless her husband be voluntarily reconciled. *Held* that, where a wife had abandoned her husband and lived in adultery, she was not entitled to quarantine.

Lyons v. Lyons, 74 S.W. 467, 101 Mo. App. 404.

Mo.App. 1905. Where a widow applies to the probate court for an allowance and a year's maintenance out of the estate of her deceased husband, the court has jurisdiction to entertain a defense based on a separation agreement by which she released all her rights in the husband's property, even though such contract be regarded as affirmatively enforceable only in equity.

Fisher v. Clopton, 85 S.W. 623, 110 Mo. App. 663.

A separation contract between husband and wife may bar her right to an allowance and to a year's support from his estate, although there is no stipulation in the separation contract whereby she expressly renounces her interest in her husband's property.

Fisher v. Clopton, 85 S.W. 623, 110 Mo. App. 663.

Mo.App. 1948. A mere showing that husband and wife lived apart for one whole year or more prior to death of one or the other is insufficient to show "abandonment" within statute barring dower, curtesy and statutory allowances, but there must be showing of intention on part of one charged with it, to give up completely, relation of husband or wife with no intention to resume it. Mo. R.S.A. § 337, V.A.M.S. § 469.210.

In re Clark's Estate, 213 S.W.2d 645.

⇐189. —— Relinquishment after death of decedent.

Mo. 1921. A quitclaim deed by the widow of the owner of a homestead conveyed all of her rights in the property, whether of homestead, dower, or quarantine.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Mo.App. 1911. Where a widow, whose husband died testate, but without a child or other descendant, after renouncing the will elected, in accordance with Rev.St.1909, § 353, V.A.M.S. § 469.110, to take in lieu of dower, under the direct provisions of Rev. St.1909, § 351, V.A.M.S. § 469.090, one-half of the real and personal estate belonging to her husband absolutely, subject to the payment of his debts, she is entitled under the direct provisions of Rev.St.1909, §§ 116,

For later cases see same Topic and Key Number in Pocket Parts

117, V.A.M.S. §§ 462.460, 462.470, to choose personal property of her husband's estate, not exceeding $400, to be hers absolutely, and not subject to the husband's debts.

Martin v. Jones, 134 S.W. 1097, 155 Mo. App. 490.

Mo.App. 1918. That widower accompanied executor of his wife when executor paid her physician's and undertaker's bills did not estop widower to claim from executor allowance of $400 under Rev.St.1909, § 116, V.A.M.S. § 462.460, without deduction for payment of such bills; there being no evidence that widower assented to their payment to exclusion of his right to claim allowance.

Brown v. Keen, 201 S.W. 621.

Mo.App. 1942. A widow was entitled to statutory widow's allowance even if she effectively renounced will and elected to take a one-half interest in the estate of her deceased husband. Rev.St.1939, §§ 106, 107, 325, 327, V.A.M.S. §§ 462.450, 462.460, 469.090, 469.100.

In re Wahl's Estate, 158 S.W.2d 743, 236 Mo.App. 345.

⇐190. —— Delay in making application.

Mo. 1878. Wag.St. § 35, p. 85, allows $400 to the widow out of the personal estate. Section 36 provides that she "shall apply for such property before the same shall be distributed or sold." Section 37 says, "If the widow do not receive the property thus allowed her, and the same be sold by the executor or administrator, the court shall order the money to be paid to the widow at any time before the same be paid out for debts or distributed." *Held*, that the application of the widow, made after the money arising from the sale of the personalty has been used to pay debts, is too late.

Drowry v. Bauer, 68 Mo. 155.

Mo. 1926. Under Laws 1887, p. 177, amended by Rev.St.1889, § 4558, V.A.M.S. § 469.470, widow's quarantine right is extinguished with her right of dower unless action to recover dower is commenced within prescribed limitation of ten years.

Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442.

Mo.App. 1896. Rev.St.1889, § 188, V.A.M.S. § 462.040, requiring that claims shall be presented within two years after the granting of letters of administration, does not apply to the widow's claim for an allowance in lieu of the year's provisions allowed her by section 106.

Campbell v. Whitsett, 66 Mo.App. 444.

Mo.App. 1903. An application by a widow for her statutory allowances from the personal estate of her husband during the term of probate court at which final settlement was made should be granted, though the administrator's final settlement had previously been approved and the order for his discharge entered of record; 10 days after the adjournment of the term being allowed for appeal to circuit court by Rev.St.1899, §§ 278, 279, V.A.M.S. §§ 467.010, 467.030, and the circuit court being authorized, under the direct provisions of Rev.St.1899, § 285, V.A.M.S. § 467.090, to try the whole case anew.

Coulter v. Lyda, 76 S.W. 720, 102 Mo. App. 401.

Mo.App. 1909. A widow, ignorant of the fact that her deceased husband had an interest in a paid-up policy on the life of another, who died after the husband's death, is not guilty of laches barring her from recovering a cash allowance in lieu of provisions out of the money paid on the policy, especially where the estate of the deceased husband was not prejudiced by her delay of about nine years in demanding the allowance.

In re Ulrici's Estate, 122 S.W. 761, 145 Mo.App. 463.

Rev.St.1899, § 185, Ann.St.1906, p. 399, V.A.M.S. § 464.020, barring demands not presented in two years from granting of letters of administration, does not apply to the demand of the widow for cash allowance in lieu of provisions of one year's support, as authorized by sections 105, 106, V.A.M.S. § 462.450.

In re Ulrici's Estate, 122 S.W. 761, 145 Mo.App. 463.

Though Rev.St.1899, § 4273, Ann.St.1906, p. 2349, V.A.M.S. § 513.120, barring actions unless commenced within five years, applies to the demand of a widow for a cash allowance in lieu of provisions for one year's support, limitations do not begin to run until letters of administration have been granted; and the widow, though entitled to take out letters, need not do so.

In re Ulrici's Estate, 122 S.W. 761, 145 Mo.App. 463.

Mo.App. 1911. Rev.St.1909, § 116, V.A.M.S. § 462.460, provides that in addition to dower a widow may take personal property not to exceed $400. Section 117 V.A.M.S. § 462.470, provides that the widow shall apply for such property before distribution. Section 118 V.A.M.S. § 462.480, provides that if the widow does not receive such property, and the same is sold, the court shall order the money to be paid to the widow at any time before distribution. An executor distributed the money to the heirs more than 15 months after the death of the testator, and the widow

did not apply for such allowance, and died 32 months after her husband. *Held*, the widow's administrator could not claim the $400.

Lamar v. Belcher, 136 S.W. 748, 154 Mo. App. 571.

Mo.App. 1936. Failure of widower or his guardian to apply for statutory allowances during widower's lifetime *held* not to preclude widower's administrators from obtaining such allowances, since statute does not require application therefor by surviving spouse. Mo.St.Ann. §§ 106, 107, pp. 67, 69, V.A.M.S. § 462.450.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Application for statutory allowances to surviving spouse within twelve months or before distribution of personalty will be considered as having been made within "reasonable time." Mo.St.Ann. §§ 106, 107, pp. 67, 69, V.A.M.S. § 462.450.

Monahan v. Monahan's Estate, 89 S.W.2d 153, 232 Mo.App. 91.

Administrators of deceased ward whose guardian failed to apply for statutory allowances in estate of ward's predeceased wife could make such application after ward's death, since right of surviving spouse to such allowances does not depend on length of survivorship. Mo.St.Ann. §§ 94, 106, 107, pp. 57, 67, 69, V.A.M.S. §§ 462.140, 462.450.

Monahan v. Monahan's Estate, 89 S.W.2d 153, 232 Mo.App. 91.

Mo.App. 1950. Where there were never any applications made for allowances for one year's support for the widow or allowance of an amount as the widow's absolute property before final settlement of the estate of the deceased husband or at any other time during the twelve years the widow survived her husband nor since her death, such allowances could not be made in an action by the administrators of the estate of the deceased husband against the executor of the estate of the widow for an accounting. Mo.R.S.A. §§ 106, 107, 108, V.A.M.S. §§ 462.450–462.470.

Andrews v. Brenizer, 230 S.W.2d 787.

⇐191. Selection by persons entitled.

Mo.App. 1883. Rev.St. §§ 107, 108, provide that a widow may take such personal property as she may choose, not to exceed the appraised value of $400, and that she shall apply for such property before the same shall be distributed or sold. *Held*, that the administrator cannot purchase property which the widow has a right to choose as her own without the full knowledge and consent of the widow, and if he would uphold such sale, it is for him to show that he has given notice to the widow, where she is on the spot and can be reached, and that in the absence of such notice her right of election is not barred as between herself and the administrator, at least where there has been no unusual delay on her part.

Heller v. Leisse, 13 Mo.App. 180.

⇐192. Setting apart by executors or administrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐193. Setting apart by appraisers.

Mo.App. 1949. The purpose of an appraisement under statute providing that widower or widow may choose such personalty of deceased only that he or she may choose not to exceed appraised value of $400, is to fix some basis on which to charge executor or administrator with trust property which comes into his hands. Mo.R.S.A. § 107, V.A.M.S. § 462.460.

State ex rel. Meyer v. Arnold, 220 S.W. 2d 942.

⇐194. Allowance by court.

⇐194(1). In general.

Mo. 1922. The additional property allowed widower or widow under Rev.St.1919, § 107, V.A.M.S. § 462.460, providing that a widower or widow may also take personal property not exceeding $400 in value, requires an application and order of the court for its allowance, and a receipt therefor must constitute part of the record.

Lynch v. Jones, 247 S.W. 123.

Mo.App. 1898. Where the widow of a decedent came into court having jurisdiction of the estate, and applied for and secured an allowance "as the widow of a resident," she could not afterwards be heard on another application for a different allowance under a claim that the decedent was a nonresident.

In re Austin's Estate, 73 Mo.App. 61.

Mo.App. 1913. Under Rev.St.1909, § 1807, V.A.M.S. §§ 509.420, 509.430, an administrator may, where a widower claims personal property of his wife, set up as a counterclaim the claimant's unauthorized use of property, other than that which passed to the claimant absolutely, before the administrator came into possession.

Nelson v. Troll, 156 S.W. 16, 173 Mo. App. 51.

Mo.App. 1914. In view of Rev.St.1909, § 289, V.A.M.S. § 467.010, an allowance to a widow of an award of money in lieu of a year's provisions may be made ex parte, and, in case the widow is administering the estate, without the appointment of an admin-

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istrator ad litem, or without notice to creditors.

In re Fritch's Estate, 164 S.W. 659, 179 Mo.App. 434.

Mo.App. 1949. Though right of a widower or widow to take personalty of deceased that he or she may choose not to exceed appraised value of $400, is a vested right, actual ownership of specific personalty does not pass to widower or widow until it is appropriated and set aside to him or her under an order of probate court. Mo.R.S.A. §§ 105, 106–109, V.A.M.S. §§ 462.390, 462.450–462.480.

State ex rel. Meyer v. Arnold, 220 S.W.2d 942.

Probate court in making allowance under statute providing that widower or widow may take such personalty of deceased only that he or she may choose not to exceed appraised value of $400, is not bound by the appraisement in face of a showing by heirs or creditors that appraisement is grossly erroneous. Mo.R.S.A. § 107, V.A.M.S. § 462.460.

State ex rel. Meyer v. Arnold, 220 S.W.2d 942.

Mo.App. 1951. Application for statutory allowances from estate of deceased wife for one year's support and personalty of value of $400 was not triable by jury and was in the nature of an equitable proceeding, and Court of Appeals on appeal was required to consider the cause de novo, giving due deference to findings of trial court as to facts and weight of testimony. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Mo.App. 1952. The value of household furnishings, which, not to exceed the value of $500, surviving spouse is entitled to take as his or her absolute property, must be ascertained by the probate court upon application of surviving spouse that the particular articles be set apart. V.A.M.S. § 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐194(2). Jurisdiction.

Mo.App. 1886. The property set apart to the widow by Rev.St.1879, §§ 105, 107, 108, must regularly pass through the probate court and the hands of the decedent's administrator, and the circuit court has no jurisdiction in the matter except on appeal from the probate court.

Griswold v. Mattix, 21 Mo.App. 282.

Rev.St. § 2, authorizing the probate court to dispense with administration where the decedent's estate is of less value than $400, and casting the property directly upon the widow and minor children, can only be given effect in the probate court, and cannot be invoked in the circuit court except upon appeal from the probate.

Griswold v. Mattix, 21 Mo.App. 282.

Mo.App. 1895. Where the administrator on an application by the widow in the probate court for her dower and a year's maintenance answered alleging that plaintiff had by writing released her right to dower and year's maintenance except in what might remain after all debts had been paid, the probate court had no jurisdiction to try such question, and hence an order allowing such dower and maintenance was proper.

Cauley v. Truitt, 63 Mo.App. 356.

Mo.App. 1941. The fact that particular asset, over which probate court is exercising ancillary administration, is only asset of nonresident decedent's entire estate, does not enlarge such court's jurisdiction to grant allowances to decedent's minor children, but their rights to such allowances must be determined by court in which domiciliary administration is pending, though no assets out of which allowances can be paid are within such court's jurisdiction. Rev.St.1939, §§ 106, 107, 110, Mo.St.Ann. §§ 107, 108, 111, pp. 69, 70, 73, V.A.M.S. §§ 462.450, 462.460, 462.490.

Jaeglin v. Moakley, 151 S.W.2d 524, 236 Mo.App. 254.

Mo.App. 1950. Allowances to surviving widow for one year's support and as her absolute property were within the jurisdiction of the probate court to make and could not in the first instance be allowed by the circuit court. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

Andrews v. Brenizer, 230 S.W.2d 787.

⇐194(3). Parties and pleading.

Mo. 1873. An application by the widow for her allowance under the administration act need not be in writing.

Cummings v. Cummings, 51 Mo. 261.

Mo.App. 1935. Although no pleading was filed on behalf of estate in widower's proceeding for statutory allowance, estate in probate court and in circuit court to which matter was certified because probate judge was a witness could interpose any consistent defenses and could introduce postnuptial property settlement. Mo.St.Ann. §§ 108, 198, pp. 70, 131, V.A.M.S. §§ 462.460, 464.280.

Hall v. Greenwell, 85 S.W.2d 150, 231 Mo.App. 1093.

⇐194(4). Objections and exceptions.

For cases from other jurisdictions, see other Key Number Digests.

For references to other topics, see Descriptive-Word Index

⇐194(5). Evidence.

Mo.App. 1919. Personalty *held* sufficient to support an allowance under Rev.St.1909, § 114, V.A.M.S. § 462.450, of $500 to widow for her year's support, and an allowance under section 116 V.A.M.S. § 462.460, of $400 in cash as her absolute property.

Peugh v. McKinney, 211 S.W. 83.

Mo.App. 1926. Testimony of decedent's attorney *held* to support judgment allowing widow's claim against estate on theory that her separation agreement with decedent was null, in that divorce, as well as property settlement, was agreed to.

In re Means' Estate, 284 S.W. 186.

Evidence of negotiations pending divorce for division of property covered by prior contract of separation and nonpayment of sum receipted for at end of such contract *held* to support judgment allowing widow's claim against husband's estate on theory that contract was abandoned.

In re Means' Estate, 284 S.W. 186.

Evidence *held* to support judgment allowing widow's claim against estate, on theory that her signature of separation agreement dividing property was obtained by duress.

In re Means' Estate, 284 S.W. 186.

Mo.App. 1928. Evidence *held* to justify finding that decedent made no payment under marriage contract, on which widow's claim against estate was based.

Williams v. Schneider, 1 S.W.2d 232, second case.

Mo.App. 1930. Evidence *held* to support finding that widow was entitled to quarantine in farm land, notwithstanding husband at time of death resided on town lots. Rev. St.1919, § 334, V.A.M.S. § 469.220.

Prouty v. Hall, 31 S.W.2d 103.

Mo.App. 1932. Burden was on widow seeking statutory allowances to prove that husband, previously adjudged insane, was sane at time of reconciliation after separation agreement.

Wormington v. Wormington, 47 S.W.2d 172, 226 Mo.App. 195.

Mo.App. 1948. Evidence disclosing that husband and wife lived apart by mutual consent and agreement was insufficient to show such "abandonment" of husband by wife as to defeat her right to widow's statutory allowances. Mo.R.S.A. § 337, V.A.M.S. § 469.-210.

In re Clark's Estate, 213 S.W.2d 645.

Mo.App. 1951. In action by widower against administrator of deceased wife's estate to recover statutory support allowance of one year and statutory allowance of personalty of the value of $400, testimony of widower that he had actually spent more than $4,200 during the year after wife's death was of little probative value in arriving at a reasonable allowance under statute, in absence of any explanation of items constituting alleged expenditure of more than $4,200. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W. 2d 568.

In action by widower against administrator of deceased wife's estate to recover administrator's statutory support allowance of one year and statutory allowance of personalty of the value of $400, evidence sustained allowance made by probate court and circuit court of $3,800 plus $400 made to widower. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

Mo.App. 1952. Surviving spouse, claiming as his absolute property household furnishings which had belonged to deceased wife, had the burden of showing that such property did not exceed the value of $500. V.A.M.S. § 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐194(5½). Trial and new trial.

Mo. 1872. An application for an allowance to a widow under Wag.St. p. 88, §§ 33, 34, is a matter dependent wholly on the discretion of the court, and should not be submitted to the jury.

Whaley v. Whaley, 50 Mo. 577.

Mo.App. 1907. On appeal to the circuit court by a widow from a judgment against her by the probate court on her petition for a money allowance in lieu of provisions for a year's support, under Rev.St.1899, § 105, Ann. St.1906, p. 372, V.A.M.S. § 462.450, the petitioner was entitled to dismiss where she was not prepared for trial, and it was not an objection thereto that the administration of the estate might be indefinitely postponed by successive presentations of her claim and dismissals, since the allowance must be applied for before the personal property of the estate was distributed or sold.

In re Howard's Estate, 106 S.W. 116, 128 Mo.App. 482.

Mo.App. 1949. Where there is a gross overvaluation of property appraised under statute providing that widower or widow of deceased may take such personalty only that he or she may choose not to exceed appraised value of $400, probate court should, on hearing widow's application, arrive at a fair and reasonable valuation either by evidence or by

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a reappraisal. Mo.R.S.A. § 107, V.A.M.S. § 462.460.

State ex rel. Meyer v. Arnold, 220 S.W.2d 942.

⇐194 (6). Judgment or order.

Mo. 1872. On an application for allowance of absolute property to the widow, it is error to render judgment against the executors or administrators. The proper relief is an appropriation of the assets in their hands.

Whaley v. Whaley, 50 Mo. 577.

Mo.App. 1896. On application by a widow for an allowance in money out of the assets of her deceased husband's estate in lieu of the year's provisions, allowed her by Rev. St.1889, § 106, V.A.M.S. § 462.450, the judgment for the widow should be no more than a judgment establishing the claim, or an order appropriating assets, ascertained to be unappropriated, to the payment of the claim, and ordering it paid.

Campbell v. Whitsett, 66 Mo.App. 444.

Mo.App. 1913. Rev.St.1909, § 220, V.A.M.S. § 464.310, authorizing probate courts to vacate an order allowing a demand against an estate within four months after the allowance thereof, is inapplicable to the allowance of a sum of money in lieu of a year's support, as provided for in Rev.St.1909, § 115.

In re Fritch's Estate, 164 S.W. 659, 179 Mo.App. 434.

Mo.App. 1922. Reasonable allowance to widow is within court's discretion.

Mahon v. Fletcher's Estate, 245 S.W. 372.

⇐194(7). Review.

Mo.App. 1913. A finding of the trial court as to a reasonable sum for provisions for the widower for a year allowed by Rev. St.1909, § 115, V.A.M.S. § 462.450, is not open to review on appeal.

Nelson v. Troll, 156 S.W. 16, 173 Mo.App. 51.

Mo.App. 1914. The action of the probate court in allowing a widow a sum of money in lieu of a year's provisions authorized by Rev.St.1909, § 115, V.A.M.S. § 462.450, is a final judgment, as shown by Rev.St.1909, §§ 289, 290, V.A.M.S. §§ 467.010, 467.030, and such judgment cannot be modified by the probate court at a subsequent term; no appeal having been taken.

In re Fritch's Estate, 164 S.W. 659, 179 Mo.App. 434.

Mo.App. 1922. Rev.St.1919, § 282, V.A.M.S. § 465.230, provides that appeal shall be allowed from the probate to the circuit court on orders making allowances to the widow, etc., and where on petition by collateral heirs the judge of probate treated them as such, reduced the amount previously allowed, denied the motion to set aside the previous order, and entertained affidavit for and allowed appeal, the circuit court properly accepted jurisdiction.

Mahon v. Fletcher's Estate, 245 S.W. 372.

Where in proceeding by alleged collateral heirs of decedent to reduce the amount of the widow's allowance, affidavits filed in probate showing that plaintiffs were the sole and only collateral heirs of decedent were a sufficient showing to entitle plaintiffs to appeal; it not being necessary to their right that the probate court adjudge them to be heirs.

Mahon v. Fletcher's Estate, 245 S.W. 372.

The finding of the trial court on the amount of a widow's allowance is binding on appeal if supported by substantial testimony.

Mahon v. Fletcher's Estate, 245 S.W. 372.

Mo.App. 1926. Order of probate court making allowance to widower of sum in lieu of provision *held* appealable, and appeal must be taken within term or stated period thereafter.

In re Wickard's Estate, 282 S.W. 173.

Mo.App. 1926. Defense of fraud and duress in execution of property settlement contract by wife *held* before circuit court on appeal from probate court, though she filed no answer, as administratrix of husband's estate, to intervening creditors' petition, in view of statute and parties' admission in record. Rev.St.1919, § 197, V.A.M.S. § 464.280.

In re Means' Estate, 284 S.W. 186.

Mo.App. 1932. Filing $100 appeal bond approved by probate court on appeal from order granting widower sustenance out of wife's estate, *held* to preclude dismissal. Rev.St. 1929, §§ 288, 290, V.A.M.S. §§ 467.050, 467.070.

Nidy v. Rice, 44 S.W.2d 196, 226 Mo.App. 610.

Mo.App. 1936. Appeal by widower's administrators in single affidavit from orders of probate court denying statutory allowance and striking from files renunciation of will *held* to give circuit court jurisdiction to make allowance, where it appeared that probate court ruled on both matters and rulings were set out in same entry of record. Mo.St.Ann. §§ 106, 107, 284, 324, pp. 67, 69, 177, 210, V.A.M.S. §§ 462.450, 467.010, 469.130.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Even if administrators appealing from orders of probate court included in affidavit

prayer for appeal from order striking from files renunciation of will, circuit court was not deprived of jurisdiction to determine whether probate court properly denied statutory allowance. Mo.St.Ann. §§ 106, 107, 284, 324, pp. 67, 69, 177, 210, V.A.M.S. §§ 462.450, 467.010, 469.130.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Inclusion in administrators' affidavit prayer for appeal from order of probate court striking from files renunciation of will would be considered surplusage and harmless, since renunciation was unavailing as to realty and unnecessary as to personalty. Mo. St.Ann. §§ 106, 107, 284, 324, pp. 67, 69, 177, 210, V.A.M.S. §§ 462.450, 467.010, 469.130.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Mo.App. 1937. Order of probate court determining widower's claim to statutory allowances from estate of deceased wife *held* appealable to circuit court, and hence after appeal circuit court of another county acquired jurisdiction by change of venue. Mo. St.Ann. §§ 106–108, pp. 67, 69, 70, V.A.M.S. §§ 462.450, 462.460.

Neelsen v. Bess, 99 S.W.2d 863.

Mo.App. 1949. An affidavit that affiant, executrix of decedent's estate, stated that her appeal from probate court judgment, granting statutory allowances and year's support to woman claiming to be decedent's widow, was not taken for vexation or delay, but because affiant believed that she was aggrieved by court's decision, was sufficient as clearly showing that appeal was taken by executrix in her official, not individual, capacity.

Rone's Estate v. Rone, 218 S.W.2d 138.

On appeal from judgment rendered by circuit court on appeal from probate court's judgment for one claiming statutory allowances and year's support from decedent's estate as his widow, cause is tried de novo and Court of Appeals must examine record and reach its own conclusions as to whether facts justify judgment, though court gives due deference to trial court's findings as to facts and weight of testimony.

Rone's Estate v. Rone, 218 S.W.2d 138.

In action for statutory allowances to and year's support of plaintiff as decedent's widow error in admitting in evidence certified copy of plaintiff's and decedent's marriage certificate, first recorded after decedent's death, was harmless to executrix appealing from judgment for plaintiff, in view of oral testimony of justice of the peace, who performed ceremony, as to all facts shown by such copy. Pope's Dig. § 10043.

Rone's Estate v. Rone, 218 S.W.2d 138.

Mo.App. 1949. Where widow filed a receipt for automobile under statute providing that widow may take such personalty of deceased only that she may choose, not to exceed appraised value of $400, without having made application to and without having obtained an order of probate court, the striking from the files of such premature receipt was not a final order from which widow could appeal to circuit court. Mo.R.S.A. § 107, V.A.M.S. § 462.460.

State ex rel. Meyer v. Arnold, 220 S.W. 2d 942.

A final ruling of a probate court on a widow's application for the appropriation or setting apart of an automobile as her statutory allowance, is appealable. Mo.R.S.A. §§ 107, 283, V.A.M.S. §§ 462.460, 467.010.

State ex rel. Meyer v. Arnold, 220 S.W. 2d 942.

Statutory provisions authorizing appeal from probate court to circuit court under certain circumstances did not authorize appeal by widow to circuit court from order of probate court striking from files premature receipt filed by widow for automobile which widow sought to have set apart for her statutory allowance. Mo.R.S.A. §§ 107, 283, subds. 1, 3, 4, 12, V.A.M.S. §§ 462.460, 467.010.

State ex rel. Meyer v. Arnold, 220 S.W. 2d 942.

Mo.App. 1951. Application for statutory allowances from estate of deceased wife for one year's support and personalty of value of $400 was not triable by jury and was in the nature of an equitable proceeding, and Court of Appeals on appeal was required to consider the cause de novo, giving due deference to findings of trial court as to facts and weight of testimony. Mo.R.S.A. §§ 106, 107, V.A.M.S. §§ 462.450, 462.460.

McDonnell v. Oxler's Estate, 235 S.W.2d 568.

⚖195. Effect of allowance.

Articles assigned to a widow, under Wag.St. p. 88, § 33, as a part of her allowance, vest in her a complete title to them.

Mo. 1872. Bryant v. McCune, 49 Mo. 546.

Mo. 1873. Cummings v. Cummings, 51 Mo. 261.

Mo. 1884. An order of the probate court requiring an executor to pay an allowance is, so long as it remains unappealed from, binding on the executor and conclusive on his sureties.

State ex rel. Richardson v. James, 82 Mo. 509.

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Mo.App. 1890. A testator made his widow and a son his residuary legatees, and also named the son as executor. After the son had qualified as executor, and after the widow had received her statutory property, the widow and the son executed a chattel mortgage on their right and title in the personal estate of the testator, with all claims to which they were entitled as heirs, and also all claims to which the widow was entitled as widow of the deceased. *Held*, that the mortgage was valid so far as it included property set apart to the widow.

Boeger v. Langenberg, 42 Mo.App. 7.

Mo.App. 1910. Should the widow die without disposing of personalty allowed her by Rev.St.1899, § 107, Ann.St.1906, p. 373, V.A.M.S. § 462.460, allowing the widow $400 in value of the husband's estate, such property would go to her heirs through the administrator, as against the claims of general creditors of the husband.

Lazonby v. Smithey, 131 S.W. 708, 151 Mo.App. 285.

Mo.App. 1921. Where intestate husband dies childless and without other descendants, and the surviving widow is allowed the $400, as provided in Rev.St.1919, § 107, V.A.M.S. § 462.460, and she elects to take one-half of the personal property, as provided in sections 321 and 323, V.A.M.S. §§ 469.090, 469.110, the $400 should not be deducted from the amount of the widow's share, on final distribution between the widow and collateral heirs; the allowance of the $400 under such circumstances not being considered as dower, under sections 105, 106, and 108.

In re Stambaugh's Estate, 235 S.W. 472, 210 Mo.App. 636.

Mo.App. 1941. Where after allowances had been ordered under statute providing for an allowance to surviving spouse and under statute permitting widow to take such personal property only, that she may choose, not to exceed value of $400, court ordered personalty, appraised at $591.25 turned over to the widow without any direction regarding which allowance should be satisfied first out of the property, the widow could apply the payment to liquidation of either. Rev.St.1939, §§ 106, 107, Mo.St.Ann. §§ 107, 108, pp. 69, 70, V.A.M.S. §§ 462.450, 462.460.

In re Foeste's Estate, 153 S.W.2d 802.

Where court ordered personalty appraised at $591.25 turned over to widow without direction as to whether payment should be applied to $450 allowance under statute providing for allowance to surviving spouse or to allowance under statute permitting widow to take such personal property only, that she may choose, not to exceed appraised value of $400, the widow was not compelled to exercise her right to apply payment at any particular time and could do so at any time before final judgment in suit to compel administrator to pay portion of widow's allowance from money on hand. Rev.St.1939, §§ 106, 107, Mo.St.Ann. §§ 107, 108, pp. 69, 70, V.A.M.S. §§ 462.450, 462.460.

In re Foeste's Estate, 153 S.W.2d 802.

Where court allowed widow $450 under statute providing for allowance to surviving widow and also granted allowance under statute permitting widow to take such personal property only, that she may choose, not to exceed appraised value of $400 and thereafter court ordered personalty, appraised at $591.25, turned over to widow without any direction regarding which allowance should be satisfied first out of the property, trial court's determination that the $450 allowance had been paid in full out of the personalty, and that money realized from partition sale of realty could not be applied to payment of the $400 allowance was improper, since the widow could apply the payment to liquidation of either. Rev.St.1939, §§ 106, 107, Mo.St.Ann. §§ 107, 108, pp. 69, 70, V.A.M.S. §§ 462.450, 462.460.

In re Foeste's Estate, 153 S.W.2d 802.

⇐196. Increase or further allowance.

For cases from other jurisdictions, see other Key Number Digests.

⇐197. Decrease or revocation.

Mo.App. 1932. In action to set aside widow's allowances for fraud, evidence that defendant's first husband stated he was divorced *held* admissible to prove defendant's good faith, but not to prove divorce. Rev.St. 1929, §§ 107, 108, V.A.M.S. §§ 462.450, 462.460.

Kurzweil v. Enyart, 54 S.W.2d 464.

In action to set aside widow's allowances for fraud, defendant's testimony that, when remarrying, she believed first husband had obtained divorce, *held* not conclusive upon chancellor. Rev.St.1929, §§ 107, 108, V.A.M.S. §§ 462.450, 462.460.

Kurzweil v. Enyart, 54 S.W.2d 464.

Finding that defendant was not divorced from first husband when marrying deceased and that she fraudulently represented herself as widow to obtain widow's allowances *held* sustained by evidence. Rev.St.1929, §§ 107, 108, V.A.M.S. §§ 462.450, 462.460.

Kurzweil v. Enyart, 54 S.W.2d 464.

⇐198. Deficiency.

Mo.App. 1928. Reasonable allowance to widow for deficiency in provisions on hand is largely within court's discretion. Rev.St. 1919, §§ 105, 106, V.A.M.S. § 462.450.

Williams v. Schneider, 1 S.W.2d 230.

⇐199. Improper or excessive allowance.

Mo.App. 1932. In proceedings to set aside allowance of widower's claim for sustenance, evidence *held* to justify allowance made. Rev.St.1929, §§ 106, 107, V.A.M.S. § 462.450.

Nidy v. Rice, 44 S.W.2d 196, 226 Mo.App. 610.

That allowance of widower's claim for sustenance from deceased wife's estate deprives direct or collateral heirs of estate *held* not grounds for setting it aside. Rev.St.1929, §§ 106, 107, V.A.M.S. § 462.450.

Nidy v. Rice, 44 S.W.2d 196, 226 Mo.App. 610.

⇐200. Rights of creditors.

Mo.App. 1926. Widow may enforce her lawful rights in deceased husband's estate as against intervening creditor paying all burial expenses though suit for divorce was pending at time of husband's death.

In re Means' Estate, 284 S.W. 186.

Mo.App. 1936. Where there is a deficiency in articles included in statutory allowance to surviving spouse, right to allowance out of estate to supply deficiency inures to surviving spouse free from claims of creditors or other beneficiaries. Mo.St.Ann. §§ 106, 107, 324, pp. 67, 69, 210, V.A.M.S. §§ 462.450, 469.130.

Monahan v. Monahan's Estate, 89 S.W. 2d 153, 232 Mo.App. 91.

Mo.App. 1952. Statutory right of surviving spouse to take enumerated items and types of personal property as his or her absolute property comes into being at the very moment of death in order to effectuate legislative purpose of preserving the family status, and surviving spouse, takes such property free from any claims against decedent's estate or any set-off against any interest which the particular beneficiary may have against the balance of estate. V.A.M.S. § 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

⇐201. Rights of distributees or heirs.

Mo. 1952. In action by sisters against their brother for accounting as to personal property owned by their father upon his intestate death and for other relief, evidence supported trial court's determination that value of such property had not exceeded widow's allowance and that widow had received benefit of it during her life.

Henry v. Steward, 250 S.W.2d 527.

Where value of father's personal property upon his intestate death had not exceeded widow's allowance, and widow had received benefit of such property during her life, her daughters upon her intestate death were not entitled to share in the personal property of their father.

Henry v. Steward, 250 S.W.2d 527.

Mo.App. 1952. Statutory right of surviving spouse to take enumerated items and types of personal property as his or her absolute property comes into being at the very moment of death in order to effectuate legislative purpose of preserving the family status, and surviving spouse takes such property free from any claims against decedent's estate or any set-off against any interest which the particular beneficiary may have against the balance of estate. V.A.M.S. § 462.450.

In re Polizoe's Estate, 246 S.W.2d 391.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) LIABILITIES OF ESTATE.

⇐202. Obligations of decedent in general.

⇐202(1). In general.

Mo. 1869. Where goods were to be paid for by depositing the amount in a certain bank to the order of the vendor, but by mistake it was deposited in the name of his agent, the administrator of the agent's estate was liable for the sum to the principal, though under a misapprehension of the rights of claimants he may have paid it to another party.

McCrary v. Ashbaugh, 44 Mo. 410.

Mo. 1873. Where a testator has in his will directed his executors to provide for the support of the family till the estate should be distributed, no action lies against them for supplies furnished without their order. If they failed to furnish reasonable supplies, the family would have a remedy in equity, if not the probate court itself.

Reid v. Porter, 54 Mo. 265.

Mo. 1875. An administrator, after personal service, obtained judgment by default on a note given to the intestate, and realized the amount due, and the maker subsequently sued to recover back the money, claiming that the debt had already been paid to the deceased. The proof showed merely a promise of the latter to deliver up the note. *Held*, that the duty of surrendering it was a moral, and not a legal, obligation, and not a good consideration for the promise, and hence that such agreement would not sustain the action against the administrator.

Greenabaum v. Elliott, 60 Mo. 25.

Mo. 1885. The claim of a surety may be allowed against the estate of the deceased

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debtor, though the surety paid the obligation after the death of the debtor.

Ferguson's Adm'r v. Carson's Adm'r, 86 Mo. 673, affirming Ferguson v. Carson, 9 Mo.App. 497.

Mo. 1904. At common law a husband or wife might enforce against the estate of a deceased spouse claims on contract which could not be asserted at law during the lifetime of the other party.

Grimes v. Reynolds, 83 S.W. 1132, 184 Mo. 679, affirming 68 S.W. 588, 94 Mo. App. 576.

Mo. 1923. A promise to pay a sum of money on death of promisor, based on a valuable consideration, is a valid contract, and can be enforced on promisor's death against his estate.

Schrage v. Hutt, 252 S.W. 658.

Contract by a mother with her stepdaughters, based on consideration of their joining in conveyance of inherited land, to pay them from her estate the sum realized from the sale of her share, *held* enforceable against her estate.

Schrage v. Hutt, 252 S.W. 658.

Mo. 1925. Checks *held* not barred for failure of earlier presentment, where no loss resulted.

Wooldridge v. Bryan, 270 S.W. 658, 307 Mo. 234.

Mo. 1939. "Debts" generally mean debts due by deceased or expected to be due in deceased's lifetime.

Ver Standig v. St. Louis Union Trust Co., 129 S.W.2d 905, 344 Mo. 880.

Mo. 1946. Claim by attorney for advances allegedly made to client was properly denied in respect of advances shown to have been made to persons other than client.

In re Thomasson's Estate, 196 S.W.2d 155, 355 Mo. 274, 170 A.L.R. 1170.

Mo. 1950. Monthly installments accruing after testator's death under divorce decree requiring testator to pay $100 a month for support of children, did not constitute a valid claim against testator's estate. Mo.R.S.A. § 1519, V.A.M.S. § 452.070.

Gardine v. Cottey, 230 S.W.2d 731, 360 Mo. 681, 18 A.L.R.2d 1100.

Ordinarily, the only claims which may be allowed against the estate of a deceased are debts of the deceased which were in existence at time of his death and statutory allowances, costs, and statutory liabilities incurred by his estate after his death. Mo. R.S.A. § 306, V.A.M.S. § 468.010.

Gardine v. Cottey, 230 S.W.2d 731, 360 Mo. 681, 18 A.L.R.2d 1100.

Mo.App. 1882. The probate court has no power to allow claims against a decedent's estate except for the payment of debts of the deceased in existence at the date of his death.

Ferguson v. Carson, 13 Mo.App. 29.

Mo.App. 1883. Where a deed of trust stipulated that, on the failure of the grantor to procure satisfactory insurance on the buildings on the premises, the trustee might pay the necessary premiums for insurance, and such premiums when paid should become a debt due, and bear interest from the date of their payment, the obligation on the part of the grantor to pay the premiums paid by the trustee in procuring insurance is a personal demand, or a claim for the payment of money enforceable against the grantor's executor.

Cassatt v. Vogel, 14 Mo.App. 317.

Mo.App. 1903. Where one for whom a building is being constructed under contract dies, the debt to the original contractor is a demand against his estate.

P. M. Bruner Granitoid Co. v. Klein, 73 S.W. 313, 100 Mo.App. 289.

Mo.App. 1904. Where a divorced wife was entitled to recover against her divorced husband for the maintenance of their children, awarded to her custody by the divorce decree, she was entitled to maintain a claim for such maintenance against her husband's estate after his death.

Lukowski v. Lukowski, 83 S.W. 274, 108 Mo.App. 204.

Mo.App. 1913. An instrument by which decedent promises to pay to the order of "R. or family" a certain amount, though it may not be good as a promissory note because of the payee being in the alternative, is an enforceable claim of R. against decedent's estate as a special contract for a sufficient consideration.

Robbins v. Robbins' Estate, 158 S.W. 400, 175 Mo.App. 609.

Mo.App. 1916. An estate is liable on a check drawn by deceased for a valuable consideration after his death presented to, and refused by, the bank; the check not being an assignment under Rev.St.1909, § 10159, V.A.M.S. § 401.189.

Fisher v. Bagnell, 186 S.W. 1097, 194 Mo. App. 581.

Mo.App. 1919. A divorced wife can have a demand for necessaries furnished minor children allowed against the estate of the father, if he be dead.

Winner v. Schucart, 215 S.W. 905, 202 Mo.App. 176.

Mo.App. 1933. No act of administratrix could be considered in determining whether

attorney had contract with deceased respecting prosecution of claim.
Turner v. Moore, 57 S.W.2d 770.

Mo.App. 1944. Where intestate did not authorize her signature to a note and knew nothing about such note, her estate was not liable on the note.
Wood v. Nokes' Estate, 176 S.W.2d 32.

⇐202(2). Contingent and unmatured claims.

Mo. 1883. Rev.St.1870, §§ 205, 206, permitting the adjustment and allowance of claims against a decedent's estate, though not due, refer to demands with some fixed or certain date of maturity, and do not apply to notes executed by decedent and payable on the deaths of certain specified persons.
Tenny's Adm'r v. Lasley's Adm'rs, 80 Mo. 664.

Mo. 1920. Allowance against deceased lessee's estate of lessor's claim for future rent not due made by the probate court *held* not authorized by Rev.St.1909, § 210, V.A.M.S. § 464.220, providing that, when the demand is not due at time of trial, the court may adjust it and render judgment thereon for the amount; future rent not accruing or due under a lease for years not being such a "demand" as is contemplated.
Elms Realty Co. v. Wood, 225 S.W. 1002, 285 Mo. 130.

It being the duty of the executrix of a deceased lessee to take possession of the leasehold, and, if it was a valuable asset, to dispose of it for the best interests of the estate, her so doing neither added to nor detracted from her liability as executrix for unaccrued rent on the lease, that is, rent not become due; the executrix or estate being liable to a present judgment for rent only for the time she occupied the premises, or for rent due and unpaid under certain other circumstances.
Elms Realty Co. v. Wood, 225 S.W. 1002, 285 Mo. 130.

Mo. 1939. Where stockholders' committee contributed most of the proceeds of sale of corporation's assets to stockholders, pursuant to agreement that persons accepting any distribution would be responsible for committee's debts, and interlocutory decree was rendered in suit against corporation and members of committee, that corporation's employee was entitled to accounting for value of patent held by corporation in trust for employee, less the value of shop rights, employee's claim against estate of deceased stockholder was not absolute but was a "contingent claim" of which probate court had no jurisdiction until the accounting should be completed and result in final decree.
Howard's Estate v. Howe, 131 S.W.2d 517, 344 Mo. 1245.

A liability may be absolute and not "contingent" as respects jurisdiction of probate court over claim therefor, even though amount due is unliquidated, or damages are undetermined.
Howard's Estate v. Howe, 131 S.W.2d 517, 344 Mo. 1245.

A "contingent claim," as respects probate court's jurisdiction over such claim against estate, is one where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there will be a liability; the contingency does not relate to the amount which may be recovered but to the uncertainty whether any amount will be recovered.
Howard's Estate v. Howe, 131 S.W.2d 517, 344 Mo. 1245.

A claim not absolute or certain is not enforceable in probate court against an estate.
Howard's Estate v. Howe, 131 S.W.2d 517, 344 Mo. 1245.

Rev.St. § 205, provides that, when a demand against an estate is not due at the time of the trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or the judgment of the court. *Held* that, where a husband agreed to pay his wife a specified sum per year for her life, but he died before her, and the claim for the annuity was not yet due, it was proper to adjust it in probate court by ascertaining the then value of the annuity.
Mo.App. 1883. Schmieding v. Doellner, 13 Mo.App. 228.
Mo.App. 1883. Schmieding v. Doellner, 13 Mo.App. 573, memorandum.

Mo.App. 1885. Personal obligation to pay annuity as claim for allowance against estate. See,
Doellner v. Schmieding, 16 Mo.App. 559, memorandum.

Mo.App. 1888. One who has contracted to sell real estate cannot after death of the vendee, and while the contract remains executory, secure an allowance against his estate for the purchase price.
Gantt v. Mechin, 30 Mo.App. 532.

A tenant covenanted that he would during the term, or at the end of it, purchase the demised premises for a specified sum. He went into possession, and while in posses-

sion died, and after his death his executor took possession of the property, and the tenant left a will by which he devised the property. Rev.St. § 138, provides that, if any person die having purchased real estate, and shall not have completed the payment nor devised such estate nor provided for the payment by will, and the completion of such payment would be beneficial to the estate, and not injurious to creditors, the executor or administrator may, by order of the court, complete the payment out of the assets in his hands, and that such estate shall be disposed of as other real estate. Section 139 provides that, if the court believes that after the payment of debts there will not be sufficient assets to pay for such real estate, the court may order the executor or administrator to sell all the right, title, and interest of the deceased therein. Section 140 provides that, if such real estate has been purchased from individuals, the court may, if considered advantageous to the estate, order the same to be relinquished to such individuals and on the best terms that can be agreed on, and by section 142 the executor or administrator may make such relinquishment by deed. *Held*, that the lessor of the land could not prefer a demand in probate court for the purchase price, the real estate having been devised, and section 138 contemplating something more than the mere allowance of an account to pass the title and complete the contract, and a judicial determination of all the facts as to the affairs of the estate being necessary.

Gantt v. Mechin, 30 Mo.App. 532.

Mo.App. 1891. Rev.St.1889, § 137, V.A.M.S. § 462.310, providing that, if any person die having purchased real estate without having completed the payment, and such completion would be beneficial to the estate and not injurious to creditors, the executor, by order of court, may complete such payment, applies solely to cases where full payment is sought as a condition precedent to the delivery of the deed, and does not preclude the allowance, as a demand in the ordinary way, of a claim for the balance of the purchase money on an executory contract for the sale of real estate.

Chapman v. Merritt, 45 Mo.App. 179.

Mo.App. 1894. An owner assigned the use of his patent process to two persons. The assignment granted to the assignees the exclusive right to use the process within a specified territory, the exclusive right to continue for a period of five years, and the assignees expressly agreed to pay annually to the owner on the 1st day of November of each year during the term of the agreement a specified sum as an annual guarantied royalty for the ensuing year. *Held*, that the promise to pay the annual royalty was absolute, and was, therefore, a proper claim against the estate of the assignee, who died, during the term of the assignment, although such claim was not due; Rev.St.1889, § 203, V.A.M.S. § 464.220, providing for the allowance of claims against estates, though not due, if to become due at a definite time.

Empire Pav. & Const. Co. v. Prather's Adm'r, 58 Mo.App. 487.

Mo.App. 1918. Contract whereby son, in consideration of his parents' conveyance to him, bound "himself, his executors, and administrators and heirs" to support parents during their lives, was not breached by son's death, so as to allow parents to establish the present value of such support, based on mortality tables, as a claim against the son's estate under Rev.St.1909, § 210, V.A.M.S., 464.220, providing that when the demand is not due the court may adjust the same, etc.

Wilbur v. Wilbur, 201 S.W. 387.

Mo.App. 1920. Pending appeal, with bond staying execution, pursuant to Rev.St. 1909, § 2042, V.A.M.S. §§ 512.080–512.100, a judgment against a decedent cannot be classified as an established demand against his estate, under Laws 1917, p. 97, § 190.

Hodde v. Teutenberg, 221 S.W. 129, 204 Mo.App. 73.

⇐202½. Personal contracts.

Mo.App. 1880. Where the petition alleges that the testator was at the time of his death, and that his executors ever since have been and are, stockholders in a bank, and the owner and holder of shares of stock therein, the estate of deceased is liable under the contract of the testator as it would have been in his lifetime, and an action lies against the executors.

Manville v. Edgar, 8 Mo.App. 324.

Mo.App. 1913. Instrument by which decedent promises to pay to order of "R. or family" a certain amount, is an enforceable claim of R. against decedent's estate as special contract.

Robbins v. Robbins' Estate, 158 S.W. 400, 175 Mo.App. 609.

⇐203. Joint contracts.

For cases from other jurisdictions, see other Key Number Digests.

⇐204. Services rendered to decedent.

Mo.App. 1910. Where decedent promised to compensate plaintiff for her services in caring for decedent by leaving her all

her property, and failed to do so, plaintiff was entitled to recover value of her services.

Taylor v. Hudson, 129 S.W. 261, 145 Mo. App. 377.

⇐205. —— In general.

⇐205 (1). Liability in general.

Mo. 1845. Under Rev.Code tit. "Administration," art, 2, §§ 24, 25, the right of action for work and labor done by plaintiff for one who induced plaintiff to marry and live with him on his false representation that he was a widower survives against his administrator.

Higgins v. Breen, 9 Mo. 497.

Mo. 1876. Under the statute relating to administration, a probate court possesses no power to allow any claims against a decedent's estate incurred subsequent to the death of the decedent.

Trustees of General Assembly of Presbyterian Church of United States v. McElhinney, 61 Mo. 540.

Mo. 1928. Contract regarding plaintiff and husband's making home with deceased did not operate to settle for services plaintiff rendered deceased before contract.

Wandling v. Broaddus, 10 S.W.2d 651.

Contract whereby plaintiff and husband agreed to make home with deceased did not cover nursing deceased or caring for property.

Wandling v. Broaddus, 10 S.W.2d 651.

Mo. 1952. The law implies a promise on part of deceased to pay reasonable value of services rendered to him after proof that services were requested and actually rendered with expectation of compensation.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1904. Where a servant performed extra services with the expectation and on the promise that she should receive a certain sum at her employer's death, she is entitled to recover that sum, though she would have performed the services without any promise of payment.

Graham v. Rapp's Estate, 80 S.W. 42, 105 Mo.App. 590.

Mo.App. 1907. In a suit against an executor for personal services alleged to have been rendered by plaintiff in nursing and caring for deceased, plaintiff was not entitled to recover for additional services rendered by her husband and son, there being nothing in the implied obligation arising out of the facts in evidence authorizing plaintiff to employ third persons to render services to deceased.

Christianson v. McDermott's Estate, 100 S.W. 63, 123 Mo.App. 448.

Where one rendering services to deceased during his lifetime expected remuneration, and deceased agreed that she should be remunerated, it is immaterial that she did not contemplate charging for the services, but expected to be compensated for them in deceased's will.

Christianson v. McDermott's Estate, 100 S.W. 63, 123 Mo.App. 448.

Mo.App. 1924. If at the time claimant furnished board and lodging to deceased he had no intention of charging for them, he cannot afterwards decide to do so and recover.

Brunnert v. Boeckmann's Estate, 258 S W. 768.

Mo.App. 1925. Law implied promise by decedent to pay for board, lodging and nursing, where unable to render services.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Mo.App. 1927. Promise of decedent to pay for board, room, and services is not implied, unless no family relation existed.

Lauf v. Wiegersen, 297 S.W. 79.

Mo.App. 1929. Meeting of minds of deceased and one rendering services as to intention to make charge therefor is unnecessary, unless there is family relationship.

Lauf v. Wiegersen, 17 S.W.2d 369.

Mo.App. 1932. Claimants' agreement with incompetent's guardian to care for her in consideration of profits from her land precluded further compensation on her death.

Chuning v. Hinkle, 49 S.W.2d 257.

Breach of contract by incompetent's heirs to convey her land to brother caring for her did not justify additional compensation against her estate, where prior contract for care with guardian remained unaltered.

Chuning v. Hinkle, 49 S.W.2d 257.

Mo.App. 1935. If decedent requested some, and received benefit of and permitted all, the services which were rendered by neighbor during 11-year period, and decedent, who was crippled, stated he didn't see how he could get along without such neighbor, estate was liable, even though decedent did not intend to pay.

O'Shaughnessy v. Brownlee, 77 S.W.2d 867, 229 Mo.App. 342.

Mo.App. 1945. Where plaintiff performed services in handling properties, investments, and business affairs of decedent and her brother under written contract executed by decedent's brother, but to which decedent was not a party, whereiu brother alone promised to pay plaintiff $3 per month and to devise to him certain realty for such

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services, plaintiff had no cause of action against decedent's estate for such services.

Evans v. Sutter, 189 S.W.2d 117, 240 Mo.App. 131.

Mo.App. 1949. Where attorney agreed with certain heirs of insane person to attempt to have him restored to competency and to recover for him property of his deceased wife for fee of one-third of amounts recovered, and all heirs contracted to be bound by agreement, and after insane person's death, attorney and all heirs entered into another contract which modified prior contracts to provide for fee of $11,000 to attorney, death of one of the heirs did not terminate his contract with attorney, and attorney had an interest in heir's estate for attorney fees, unless attorney abandoned contract.

Williams v. Patterson, 218 S.W.2d 156.

Where attorney agreed with heirs of insane person to attempt to have him restored to competency and to recover for him property of his deceased wife for fee of one-third of amounts recovered, and all heirs contracted to be bound by agreement, and after insane person's death attorney and all heirs entered into contract which modified prior contracts to provide for a fee of $11,000 to attorney, and on death of insane person's brother prior to distribution of estate of insane person's wife, attorney contended that brother's estate was entitled to no interest in insane person's estate, attorney thereby waived any right to recover attorney fees from estate of insane person's brother.

Williams v. Patterson, 218 S.W.2d 156.

Mo.App. 1951. Where deceased, while suffering from fatal illness, agreed to pay plaintiff, her sister, $10 per week, and to give her at death of deceased realty worth about $4,500 and furniture worth between $3,000 and $4,000, if plaintiff would care for her, and plaintiff rendered services for 110 weeks caring for deceased, and at the end of such time, deceased discharged plaintiff and paid her $10 a week, or a total of $1,100, plaintiff had right, after death of deceased, to abandon the contract with deceased and to seek recovery from executor of deceased for services on quantum meruit.

Brawley v. Harwell, 236 S.W.2d 419.

⇐205 (2). Amount of allowance.

Mo. 1902. Plaintiff having served deceased for from three to six months each year for the first three or four years, and from 1889 until 1898, continuously, as a companion except short vacations when sick, during which time deceased was feeble, needing constant attention, and professional nurses and those having experience in paying for such services having testified that the services were reasonably worth $3 per day, and during the last six months $5 to $6 per day, a verdict for less than $1,000 a year is not so excessive, in view of deceased's wealth and want of family, as to justify the court on appeal, in declaring the verdict to be the result of passion or prejudice.

Ryans v. Hospes, 67 S.W. 285, 167 Mo. 342.

Mo. 1928. Verdict for $8,400 for housework, nursing, caring for property, and other services rendered deceased during 7 years *held* not excessive.

Wandling v. Broaddus, 10 S.W.2d 651.

Mo. 1942. The fact that services rendered decedent during the last four years of his life were worth more than the previous four years of service did not support claim against estate for amount in excess of that specified in contract under which claimant was employed.

Adams v. Othenin's Estate, 161 S.W.2d 415.

Mo. 1952. Recovery on quantum meruit for services rendered to deceased was not limited to net value of deceased's estate. V.A.M.S. §§ 464.080, 464.100, 464.130.

Muench v. South Side Nat. Bank, 251 S.W.2d 1.

Mo.App. 1916. In suit against a decedent's estate for services rendered in the way of care, where it appeared that deceased was an old man, not of kin to the plaintiff, and lived with him over eight years, *held* that a verdict for $1,000 was not excessive.

Hinshaw v. Raines, 185 S.W. 1192.

Mo.App. 1925. Verdict of $6,500 *held* not excessive because of plaintiff's evidence as to value of services to others than decedent.

Schwartz v. Mercantile Trust Co., 279 S.W. 253.

Mo.App. 1926. Verdict *held* not excessive for services in caring for sick man.

Malone v. Harlin, 278 S.W. 806, 220 Mo.App. 102.

Mo.App. 1927. $4,000 recovery for husband and wife suing estate for care rendered deceased over 14 months' period, and for loss of husband's salary, *held* not excessive.

Guthrie v. Fields, 299 S.W. 141.

Mo.App. 1931. $5,023.84 verdict for services rendered during 28 years in helping deceased cook, wash dishes, keep house, and do chores, and in waiting on deceased during declining years, *held* not excessive.

Thayer v. Palen, 34 S.W.2d 536, 224 Mo. App. 1088.

Mo.App. 1936. Award of $2,780 for nursing services rendered decedent during his lifetime *held* not excessive, where character of diseases suffered by decedent had necessitated great care and most loathsome sort of service to keep him and his quarters sanitary and clean.

Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1938. An award of $1,275 for services performed for and attendance upon decedent by claimant against estate during last few years of decedent's life was not excessive under the evidence.

Weisenborn v. Rutledge, 121 S.W.2d 309, 233 Mo.App. 464.

Mo.App. 1944. In action against executor for nursing services rendered decedent, amount of recovery was not required to be limited to amount of residue of estate after all claims and costs of administration had been paid.

In re Stein's Estate, 177 S.W.2d 678.

Mo.App. 1951. Where deceased, while suffering from fatal illness, agreed to pay plaintiff, her sister, $10 per week, and to give her at death of deceased realty worth about $4,500, and furniture worth between $3,000 and $4,000, if plaintiff would care for her, and plaintiff rendered services for 110 weeks caring for deceased, and at the end of such time, deceased discharged plaintiff and paid her $10 a week, or a total of $1,100, and after death of deceased, plaintiff abandoned contract and sought to recover from executor of deceased on quantum meruit, judgment for $5,886, which was for $60 a week less $714 that plaintiff had already been paid, was not excessive.

Brawley v. Harwell, 236 S.W.2d 419.

⇐206. —— Persons in family relation.

⇐206(1). Liability in general.

Mo. 1951. Kinship in any degree between claimant who rendered services for deceased, and deceased, or apparent cohabitation are not necessarily essential to establishment of a "family relation" between claimant and deceased, so as to preclude recovery for such services from estate of deceased.

Wells v. Goff, 239 S.W.2d 301, 361 Mo. 1188.

Where married man and woman not his wife lived together for 20 years during which time they operated a saw mill and planer, store, restaurant, and garage, and woman worked as mechanic overhauling automobiles and also labored in saw mill eight or nine hours a day, six days a week, and there was no proof of any illicit cohabitation, but there was a type of loyalty, regard, mutual respect, and devotion between man and woman usually not observed between those in a strictly business relationship, a "family relation" existed, so as to preclude recovery by woman from estate of man after his death for services rendered.

Wells v. Goff, 239 S.W.2d 301, 361 Mo. 1188.

Mo.App. 1889. Where services were rendered by a daughter in caring for her enfeebled mother, no claim can be maintained therefor against the mother's estate, in the absence of proof of an intention on the part of the mother to pay for such services, and on the part of the daughter to receive pay therefor.

Brock v. Cox, 38 Mo.App. 40.

Mo.App. 1893. An agreement to pay for personal services need not necessarily be shown by positive proof; but the jury may infer such a contract from the circumstances in evidence, and the fact that such services are rendered by the daughter and son-in-law of the deceased recipient does not change this rule.

Ramsey v. Hicks, 53 Mo.App. 190.

Mo.App. 1897. A woman, with ample means of her own for support, went to the home of her son, and in a short time was taken sick, continuing sick and helpless for nearly three months, when she died. *Held* that, in the absence of proof to the contrary, she would be presumed to have gone to her son's house on a visit, and a bona fide claim of the son's wife for services as nurse, and for money expended for medicine, would therefore not be rejected on the ground that the decedent was a member of the son's family, and that therefore an express contract to pay for the services was necessary to warrant a recovery.

Truesdail v. Truesdail's Ex'r, 72 Mo. App. 155.

Mo.App. 1913. Where services and board were rendered and furnished by plaintiff to deceased while they and plaintiff's husband, son of deceased, were living as one family, on the expectation of both parties that they were to be paid for, though deceased expected to pay plaintiff by remembering her in her will she having failed to do so, recovery may be had against her estate.

Bowman v. Shelton, 158 S.W. 404, 175 Mo.App. 696.

Mo.App. 1917. If services rendered by daughter to her deceased mother were originally intended as gratuity, they cannot now be made subject of claim against her estate.

Morrison v. Morrison, 196 S.W. 1082, 197 Mo.App. 527.

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Mo.App. 1918. Personal services rendered by plaintiff for her husband's cousin, deceased, who resided in same family with plaintiff, were presumably rendered gratuitously.

Wood v. Lewis' Estate, 200 S.W. 681.

Mo.App. 1919. A family relationship may exist between one taken into the family by the head of the family, notwithstanding the absence of blood relationship or of legal adoption.

Nelson v. Poorman's Estate, 215 S.W. 753.

Mo.App. 1920. Where plaintiff was a member of deceased's household, being raised by him, she cannot recover for services rendered, in view of the family relation.

Weir v. Carter's Estate, 224 S.W. 147.

Mo.App. 1922. In an action by member of family of deceased to recover for services rendered, the evidence should be such as to tend to establish the relation of debtor and creditor between the parties and the assumption by the deceased of a legal obligation capable of being enforced, and the mere expectation by the claimant of a gift or gratuity by will or otherwise is not sufficient to support a recovery.

Baker v. Lyell, 242 S.W. 703, 210 Mo. App. 230.

Mo.App. 1924. In determining whether claimant is entitled to pay for services in cases where the question of "family relationship" arises, blood kinship is not always the test, but where two persons live together, concurrently rendering and receiving services, in absence of express agreement that payment is to be made in addition to benefit derived, the law presumes such benefit to be recompense for the services rendered, and that neither intended to charge or accept pay for such services.

Brunnert v. Boeckmann's Estate, 258 S.W. 768.

Where deceased, though not of kin to claimant, lived in his household, and the relationship between them was such that deceased could reasonably think he was rendering compensation by way of services for his board and lodging, thus creating the same status as where a family relationship existed, in absence of evidence that claimant intended to charge and deceased intended to pay for board and lodging, claimant cannot recover therefor during the time such status existed.

Brunnert v. Boeckmann's Estate, 258 S. W. 768.

Where deceased, though not of kin to claimant, lived with claimant's family under arrangement for board and lodging for services rendered, *held*, under the evidence, that there was no such family relationship as forbade recovery for board and lodging, after deceased became unable to render services.

Brunnert v. Boeckmann's Estate, 258 S. W. 768.

Mo.App. 1924. Even though plaintiff had been natural daughter, she would not be debarred from recovery for work in caring for decedent, if work was done under contract, express or implied, that it was to be paid for.

Wandling v. Broaddus, 265 S.W. 1003.

⇐206(2). Implied contracts.

Mo.App. 1921. Before one who is a member of a family of anotner standing in the relation of parent to him can recover for services rendered such parent, there must be clear and convincing testimony of an express contract, and, while such contract may be inferred from evidence, it cannot be implied.

Smith v. Davis' Estate, 230 S.W. 670, 206 Mo.App. 446.

Mo.App. 1927. Law implies services rendered to decedent by one inviting him into his home as member of family were gratuitous, in absence of contract.

Lauf v. Wiegersen, 207 S.W. 79.

Mo.App. 1927. No family relationship existed between aged bachelor on ranch and farm hand who lived with him, performing housework, such as to exclude implied contract for payment for services rendered.

Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Mo.App. 1947. Where claimant and decedent lived together in one household and as members of one family, a mutual understanding that services rendered by claimant in caring for decedent would be paid for means an intention and willingness to pay on the one hand and at the time the services are rendered, an expectation to be compensated on the other, with knowledge of the intention to pay.

Trantham v. Gullic, 201 S.W.2d 522.

Mo.App. 1948. Recovery by a member of decedent's family against decedent's estate for services rendered during decedent's lifetime can be had only under an express contract, as the law will imply none; and mere proof of the rendition of the services is not sufficient.

Farris v. Faris' Estate, 212 S.W.2d 71.

⇐206(3). Express promise by decedent to make compensation.

Mo.App. 1903. When, in an action by a decedent's daughter for services, plaintiff's

evidence showed that she came home at her father's request, and began work, with the understanding that she was to receive compensation, it was not error to instruct that she could recover for services from the time she began work up to the death of her father.

Shannon v. Carter, 72 S.W. 495, 99 Mo. App. 134.

Mo.App. 1905. The promise made by deceased to plaintiff's mother that, if plaintiff would come and live with deceased, she would do a good part for plaintiff, is too vague to constitute an agreement on which plaintiff could recover against the estate for services performed while living with deceased.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Mo.App. 1906. While the mere fact that a parent is taken care of by a child will not give rise to an implied contract on the part of the parent to pay for the care, yet it is not necessary in order to recover for such services to show a contract, all the terms of which were expressed, but an agreement to pay may be inferred from the circumstances.

Fry v. Fry, 94 S.W. 990, 119 Mo.App. 476.

Mo.App. 1915. Where grandfather agreed that his grandson who was supporting and nursing him, should be paid from his estate on his death, the grandson was entitled to compensation though unable to receive it in the form expected.

Biggerstaff v. Riley, 179 S.W. 744, 192 Mo.App. 92.

Mo.App. 1918. Where widowed daughter went to live with her parents, where she did housework, mere fact that father expressed an intention to bestow a bounty, and daughter expected to receive a bounty, is insufficient to show a contractual relation, such as would entitle child to recover for services against father's estate.

Clow v. Wormington, 206 S.W. 415.

Mo.App. 1922. That member of family of deceased rendering services expected compensation in a certain manner does not prevent recovery, if there was an agreement or understanding that compensation was to be made in some manner.

Baker v. Lyell, 242 S.W. 703, 210 Mo. App. 230.

Mo.App. 1947. Mere expressions of gratitude or intended generosity by decedent are insufficient to show an agreement or understanding to pay for services rendered in caring for him by one who lived together with decedent in one household and as members of one family, and services intended as a gratuity at time rendered cannot afterwards be turned into a charge.

Trantham v. Gullic, 201 S.W.2d 522.

⇐206(4). Amount of allowance.

Mo. 1952. Award of $18,564 to grandniece for services rendered to her granduncle over period of approximately 17 years was excessive, under the evidence, and would be reduced to $12,000.

Muench v. South Side Nat. Bank, 251 S.W.2d 1.

Mo.App. 1925. Verdict of $1,250 not disturbed as excessive.

Miller v. Smith, 275 S.W. 769.

Mo.App. 1933. $7,500 to daughter doing housework and farmwork for father from 1898 to 1929, and also nursing for 7 years, *held* not excessive.

Miller v. Richardson, 56 S.W.2d 614.

Mo.App. 1933. $4,000 to daughter for nursing and taking care of 90 year old father for over 15 months *held* not excessive under evidence.

Love v. Richardosn, 61 S.W.2d 220.

Mo.App. 1937. In action by niece against administrator of estate of deceased aunt for nursing, washing, ironing, cooking, and caring for deceased during her lifetime, niece was entitled to receive pay for all work she did for deceased not coming under the head of board, where evidence supported jury's finding that services were performed with the intention that they be paid for.

Patrick v. Crank, 110 S.W.2d 381.

Mo.App. 1950. A jury's verdict, awarding deceased woman's niece $4,587.50 for 37 months personal services rendered to decedent during her lifetime, was not manifestly excessive.

Borgman v. Boten, 225 S.W.2d 360.

⇐207. Loans or advances to decedent.

Mo. 1951. Where written document, which was basis of claim against deceased's estate, and which was entered into between debtor and claimant in France, provided that debtor was indebted to claimant for monies advanced to debtor in Paris, that reimbursement could not be made because debtor's funds were blocked in United States, and that debtor in payment for monies advanced assigned to claimant certain sum of all funds, securities, and credits belonging to debtor in possession of trust company in Missouri, validity of transaction was governed by law of Missouri and under such law deceased's estate was indebted to claimant.

In re De Gheest's Estate, 243 S.W.2d 83, 362 Mo. 634.

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Mo.App. 1915. Where a husband used his wife's separate money, without her written consent thereto as required by Rev.St. 1909, § 8309, V.A.M.S. § 451.250, the money was still her property, which she could recover at law by exhibiting her demand against his estate.

Deer v. Deer's Estate, 180 S.W. 572.

A wife, whose separate money had been used by her husband in the purchase of land, and who on his death took the legal title to it all as the survivor, could not enforce her demand for such amount against his estate.

Deer v. Deer's Estate, 180 S.W. 572.

⇐208. Covenants of decedent.

C.C.Mo. 1905. Where a lease, renewable forever, contained an express covenant on the part of the lessee to pay rentals during the term, the death of the lessee did not, under the Ohio statute, subjecting leasehold estates renewable forever to the law of descents and distributions governing estates in fee, convert the term into a life estate, and the lessor could pursue the estate of the deceased lessee for recovery of accruing rentals so long as there could be found assets of the estate subject thereto.

Broadwell v. Banks, 134 F. 470.

⇐209. Contracts of guaranty by decedent.

Mo. 1885. Where one surety paid the note, he was entitled to present his demand to the probate court asking to have the one-half of the amount so paid allowed against the estate of his cosurety. It was not necessary that plaintiff proceed in a court having full and complete equity jurisdiction, as courts of law have adopted the equitable doctrine of contribution and award relief to one surety who has paid more than his share.

Jeffries v. Ferguson, 87 Mo. 244.

⇐210. Agreements by decedent to make will.

Mo.App. 1910. If a decedent agreed to reward by will a certain person for services, and failed to do so, such person may recover from his estate compensation to the extent of the value of the services.

Taylor v. Hudson, 129 S.W. 261, 145 Mo. App. 377.

Mo.App. 1928. Plaintiff working for deceased on promise that half of deceased's property would be left her could maintain quantum meruit action against estate.

Blackwell v. De Arment's Estate, 300 S. W. 1035.

Mo.App. 1933. Where husband agreed to perform services for deceased in consideration of deceased's devising land to wife, wife had no rights except under contract, where she rendered no services.

Ver Standig v. St. Louis Union Trust Co., 62 S.W.2d 1094, 228 Mo.App. 1242.

Husband who orally agreed to perform services for deceased, in consideration of deceased's devising realty to his wife, could not sue in quantum meruit for services rendered, where deceased failed to devise realty to wife.

Ver Standig v. St. Louis Union Trust Co., 62 S.W.2d 1094, 228 Mo.App. 1242.

Mo.App. 1942. Where claimant showed an express contract by decedent to give claimant everything decedent had on his death for room and board for remainder of his life, claimant could waive the contract and sue the estate on quantum meruit on decedent's nonperformance.

Joseph v. Joseph, 164 S.W.2d 145.

⇐211. Torts of decedent.

Mo. 1852. Under Act Concerning Administrators, art. 2, § 25, an action lies against the administrator of one who in his lifetime was guilty of a trespass.

Froust v. Bruton, 15 Mo. 619.

Mo. 1951. The proper remedy for alleged conversion by deceased husband of assets of predeceased wife's estate is by a proceeding in probate court for the allowance of demands against deceased husband's estate.

In re Lipic's Estate, 243 S.W.2d 100, 362 Mo. 623.

Mo.App. 1877. Liability of the estate of a curator, deceased, for funds of his ward converted by him. See,

Flach v. Fassen, 3 Mo.App. 562, memorandum.

A will gave all testator's property to his wife for life with the provision that at her death it should be divided among his brothers and sisters. The wife mingled his property with her own funds. *Held*, that the remaindermen were entitled to have their claims allowed against the wife's estate as money demands.

Mo.App. 1878. Hitchcock v. Clendennin, 6 Mo.App. 99.

Mo.App.1879. Peters v. Clendennin, 6 Mo.App. 579, memorandum.

Mo.App. 1879. Hitchcock v. Clendennin, 6 Mo.App. 579, memorandum.

⇐212. Taxes.

Taxes on the personal estate of a decedent, whether they accrued before or after his death, are "demands," within Rev.St. 1879, c. 1, art. 9, and they may be established

by proceedings either in the probate or circuit court.

Mo. 1891. State ex rel. Ziegenhein v. Tittman, 15 S.W. 936, 103 Mo. 553.

Mo. 1891. State ex rel. Ziegenhein, 15 S.W. 941, 103 Mo. 569.

Taxes which administrator must pay without presentation of demand to court include personal taxes assessed against estate during administration, besides those against deceased during his lifetime. Rev.St.1919, § 181, V.A.M.S. § 464.010.

Mo. 1930. State ex rel. and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460.

Mo. 1930. State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791.

Taxes accruing after intestate's death are not debts or demands against estate, unless assessed against it rather than administrator. Rev.St.1919, §§ 181, 12756, 12766, 12773, 12932, V.A.M.S. §§ 137.085, 137.110–137.120, 137.145, 140.730, 464.010.

Mo. 1930. State ex rel. and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460.

Mo. 1930. State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791.

Estate is not fully administered, and hence cannot be finally settled, until payment of taxes against estate. Rev.St.1919, §§ 181, 12756, 12766, 12773, 12932, V.A.M.S. §§ 137.085, 137.110–137.120, 137.145, 140.730, 464.010.

Mo. 1930. State ex rel and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460.

Mo. 1930. State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791.

⇐213. Claims barred by limitation.

Mo. 1879. The allowance of a judgment against the estate of a decedent, rendered in the lifetime of decedent, is not dependent either on the fact that no execution can issue on it, or that it is not a lien on the real estate of the deceased within Wag.St. p. 101, § 1. It may be exhibited as a demand against the estate within 20 years of its rendition.

Ewing v. Taylor, 70 Mo. 394.

Mo. 1939. A judgment creditor who sued out scire facias to revive judgment within 10 years of rendition, and made personal service upon judgment debtor, without any order or judgment of revival ever being made, was not entitled to file a claim against debtor's estate, which was filed more than 10 years after rendition of judgment. Mo. St.Ann. §§ 886, 1106, pp. 1168, 1401, V.A.M.S. §§ 511.370, 516.350.

In re Jackman's Estate, 124 S.W.2d 1189, 344 Mo. 49.

Mo.App. 1877. Bar by limitation of claim for services to one afterwards deceased, as against his administrator. See, Morgner v. Bigelow, 3 Mo.App. 592, memorandum.

Mo.App. 1926. Estate *held* not estopped to set up special statute of limitations against decedent's creditor, by agreement of administratrix to file creditor's claim.

Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Nonclaim statute of limitation, limiting time for filing claims against decedent's estate, is rigidly enforced.

Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Administratrix cannot waive nonclaim statute of limitation, affecting time of filing claim against estate.

Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Mo.App. 1927. Executor may waive general statute of limitations as to claim against estate.

Overmeyer v. Rogers, 1 S.W.2d 844, 222 Mo.App. 89.

Mo.App. 1929. Ordinarily, executor cannot waive statutes of nonclaim.

Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

Mo.App. 1939. The statute of limitations may be invoked in probate court without being pleaded, since formal pleadings are not required in such court. Mo.St.Ann. §§ 198, 862, pp. 131, 1143, V.A.M.S. §§ 464.280, 516.120.

Broz v. Broz, 132 S.W.2d 1039.

Administrator of decedent's estate had privilege of urging general statute of limitations as bar to claim for general housework performed for decedent, when the claim was heard in summary way provided by statute, and the claimant had privilege of establishing by evidence any facts which would take the claim out from under the general statute of limitations. Mo.St.Ann. §§ 198, 862, pp. 131, 1143, V.A.M.S. §§ 464.280, 516.120.

Broz v. Broz, 132 S.W.2d 1039.

⇐214. Funeral expenses.

Mo. 1873. Where decedent left a widow and child who subsequently died, the funeral expenses of both widow and child were demands against the estate of the widow and not of the husband and father.

Walsh's Estate v. Morrissey, 54 Mo. 309.

Mo.App. 1896. Primarily the estate of a decedent, and not the widow, is liable for

his funeral expenses, and the mere fact that the widow requests the burial will not, without an express promise on her part to pay therefor, render her personally liable.

Hayden v. Maher, 67 Mo.App. 434.

Mo.App. 1908. A widow may order the interment for her deceased husband on a scale in proportion to deceased's financial condition, for which the estate will be liable.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

Mo.App. 1911. A third person who is not a mere interloper may lawfully incur expenses for the proper interment of decedent's body and recover the expense thereof, under Rev.St.1909, § 229, V.A.M.S. § 465.100, provided the expense was reasonable.

Cape Girardeau Bell Tel. Co. v. Hamil, 140 S.W. 951, 160 Mo.App. 521.

Where decedent while working for claimant telephone company was killed by a fall from one of its poles, and claimant's auditor, who was present at the time, directed an undertaker to care for the body, and furnish such things as were requisite for the funeral, claimant in paying such expenses was neither an interloper nor a mere volunteer, and therefore was entitled to recover the amount so paid, if reasonable, as a claim against decedent's estate, independent of any question of subrogation to the rights of the undertaker or of an assignment of his claim.

Cape Girardeau Bell Tel. Co. v. Hamil, 140 S.W. 951, 160 Mo.App. 521.

Mo.App. 1936. At common law, husband alone was liable for funeral expenses of deceased wife, and her estate was not liable.

Kent v. Knight, 98 S.W.2d 318, 231 Mo. App. 235.

Where husband predeceases wife, husband's estate is not liable for wife's funeral expenses.

Kent v. Knight, 98 S.W.2d 318, 231 Mo. App. 235.

Administration statute providing that funeral and other expenses shall be paid by estate provides only for priority of payments of claims and imposes no liability. Mo.St. Ann. § 182, p. 108, V.A.M.S. § 462.460.

Kent v. Knight, 98 S.W.2d 318, 231 Mo. App. 235.

⇐215. Tombstones and monuments.

Mo.App. 1896. Where a will provided for fixing up the graves of testatrix and her deceased husband, but gave no further or more specific directions as to such matter, *held*, under the circumstances, that the administrator was entitled to an allowance of $750 which he expended for a monument.

In re Danforth's Estate, 66 Mo.App. 586.

⇐216. Services rendered to estate.

⇐216 (1). In general.

Mo. 1913. It was proper to refuse an allowance for managing an estate to one who acted for a corporation wrongfully in charge of the estate.

Davidson v. I. M. Davidson Real Estate & Investment Co., 155 S.W. 1, 249 Mo. 474.

Mo.App. 1886. Under Rev.St.1879, §§ 100, 101, authorizing an administrator until the meeting of the court to procure indispensable labor to be performed, and providing that the court may authorize further labor to be performed as the interests of the estate require, and all sums paid for such labor, if approved by the court, shall be allowed as expenses of administration, one performing labor pursuant to an agreement with an administrator is entitled to present his claim to the court for allowance.

Powell v. Powell, 23 Mo.App. 365.

Mo.App. 1895. Where plaintiff rendered services for an administrator as an accountant in making separate accounts for the estate and for each of the heirs in settling their rent accounts with the administrator as their agent, and in aiding the administrator to prepare his annual settlements, he cannot recover against the administrator as such so as to bind the estate, the former services being chargeable to the heirs, and for the latter the administrator receives his commissions under Rev.St. § 222, V.A.M.S. § 465.100, and for neither can the administrator bind the estate.

Yeakle v. Priest, 61 Mo.App. 47.

Mo.App. 1906. Rev.St.1899, § 223, V.A.M.S. § 465.100, allows executors a commission of 5 per cent. on money arising from the sale of real estate. *Held* that, where an executor, authorized by law to sell land, employs a real estate agent to find a purchaser, and he finds one, and the sale is consummated satisfactorily to the executor, the agent is entitled to receive compensation from the estate, at least to the extent which the statute authorizes compensation to the executor for the same services.

Matson v. Pearson, 97 S.W. 983, 121 Mo. App. 120.

⇐216 (2). Services of attorneys.

Mo. 1943. Decedent's relatives could not contract with movants that they as attorneys for decedent's administrator would represent decedent's heirs solely and personally.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

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With respect to the assets that come into his custody by virtue of his office, a personal representative is a "trustee" for the deceased, his beneficiaries and creditors, and the test as to the estate's liability for services rendered by the attorney for such trustee is whether they are beneficial to the whole estate rather than some special interest, even when the attorney is directly employed by the representative.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Generally, while no allowance may be made out of a decedent's estate for legal services rendered for the sole benefit of particular heirs or beneficiaries, such allowance may be made in so far as the attorney employed by such heirs is recognized as attorney for the whole estate, and his services are accepted as beneficial thereto.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Attorneys' contract with decedent's relatives requiring attorneys to protect decedent's property and to obtain such relatives' shares in the estate as heirs and to perform any other necessary services in probate court respecting the estate meant services necessary to recover for the relatives their shares of the estate after probate and, where attoneys were employed by the administratrices before decedent's will was found, fees for services rendered to administratrices were recoverable from the estate.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where administratrices' attorneys before decedent's will was found brought three quiet title suits to cancel decedent's notes which would have constituted the basis for claims against his estate, and effected a compromise settlement with decedent's widow, which settlement involved decedent's property, attorneys were not precluded from recovering from the estate for services rendered the administratrices on ground that the quiet title suits served the heirs only.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where probate court before decedent's will was found had accepted attorneys' services for administratrices in combating claim by a claimant as decedent's widow and as his heir, decedent's executor, so far as the attorneys' services were necessary and beneficial to the estate, was "estopped" from contending that the administratrices could not employ counsel to combat the claim. Mo. R.S.A. § 306, V.A.M.S. § 468.010.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where administratrices' attorneys were unable to obtain information with respect to decedent's alleged will from his executor and believed decedent to be insane and incapable of making a will, the attorneys were not precluded from recovering from the estate for services rendered to the administratrices before the will was found on ground that they knew that the will was outstanding.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where grantee of decedent's wife received his deeds of realty conveyed by decedent to his wife after date when decedent's executor admitted that decedent was insane, and administratrices' attorneys, before decedent's will was found, brought quiet title action against grantee, attorneys were not precluded from recovering from the estate for services rendered to the administratrices on ground that attorneys could have acquired record title to the realty by obtaining a deed from grantee who was allegedly acting in decedent's interest.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where services rendered by administratrices' attorneys were valuable notwithstanding that they failed of fruition because of later production of decedent's will, and five experienced attorneys testified that the services were reasonably worth not less than $85,000 and expressed no opinion as to whether and how they should be allocated between services rendered under some heirs' contract with attorneys and under administratrices' contract, a $42,500 award was not excessive.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo. 1947. $8,500 allowed attorneys for executors for fees and $244.27 for expenses in connection with the sale of estate property which was necessary in order to pay heavy inheritance taxes would not be disturbed by the Supreme Court where the estate was valued at approximately $3,000,000, services were necessary and beneficial to the estate, amount awarded was reasonable, and the lower courts had allowed the amounts to the extent indicated. Mo.R.S.A. §§ 220, 847.-114(d), 2450, V.A.M.S. §§ 465.100, 484.030, 510.-310.

In re Sternberg's Estate, 204 S.W.2d 761.

That executor trust company of testator's will had in its employ competent legal advisers and that owners of the estate were represented by competent counsel did not preclude attorneys employed by executor from recovering for legal services rendered in connection with inheritance tax matters

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on the ground that their services were not "necessary" within the statutory provisions for allowance against an estate. Mo.R.S.A. §§ 220, 2450, V.A.M.S. §§ 465.100, 484.030.

In re Sternberg's Estate, 204 S.W.2d 761.

Mo. 1951. Where no one could possibly benefit by construction of a will except the particular parties involved, the estate was not to be burdened with payment of attorney's fees of the contestant. Mo.R.S.A. § 1135, V.A.M.S. § 527.100.

Obetz v. Boatmen s Nat. Bank of St. Louis, 234 S.W.2d 618, 361 Mo. 221.

Mo. 1952. Even though contract for attorney's services provides for specific amount, estate can only be required to pay reasonable value thereof.

In re Schield's Estate, 250 S.W.2d 151.

Probate court would not have had right to deny fee, for honest, faithful and efficient legal services rendered to estate, merely because, in opinion of court, attorney, in so doing, disqualified himself to act as trustee under testamentary trust created by decedent's will. V.A.M.S.Const. art. 5, § 16.

In re Schield's Estate, 250 S.W.2d 151.

Even if attorney, who was also one of trustees of testamentary trust created by will, had been derelict in failing to assume his duties as trustee, it would not defeat his right to compensation for services faithfully and beneficially rendered probate estate. V. A.M.S. § 462.450.

In re Schield's Estate, 250 S.W.2d 151.

Denial of fee for legal services rendered decedent's estate by attorney, who was also one of trustees under testamentary trust including entire estate, could not be predicated upon claim that allowance for his services to estate would deplete trust fund and result in unjust profit therefrom to attorney. V.A. M.S. §§ 465.100, 484.030.

In re Schield's Estate, 250 S.W.2d 151.

$17,500 was reasonable compensation for services rendered by attorney for executrix of estate, where such attorney devoted 650 hours of time in performance of his duties.

In re Schield's Estate, 250 S.W.2d 151.

Mo.App. 1887. An attorney made a contract to conduct certain litigation, and in the event of success, he was to receive one-half the damages recovered. He immediately entered upon the performance of the contract, and so prosecuted the case that there had been one trial before the death of the client. This trial resulted in favor of the adverse parties. The attorney procured the verdict to be set aside and the suit to be revived in the name of his client's administrator, and prosecuted it to judgment. *Held*, that an action lies against the administrator in his representative character for the services rendered to the estate of the deceased client.

Price v. Haeberle, 25 Mo.App. 201.

Mo.App. 1893. An attorney at law who makes a contract with an administrator to defend him in his trust relation may prosecute his claim for services rendered in pursuance of such contract directly against the estate represented by such administrator.

Nichols v. Reyburn, 55 Mo.App. 1.

So where he is employed in legal proceedings to determine who are the proper distributees of the estate.

Nichols v. Reyburn, 55 Mo.App. 1.

Mo.App. 1906. Inasmuch as Rev.St.1899, § 92, V.A.M.S. § 462.140, requires an executor to prosecute or defend actions to which the estate is a party, and section 223, § 465.100, authorizes the probate court to allow the executor a reasonable charge for legal advice and services, claims for attorney's fees with respect to the legal phases of the management of the estate are demands against the estate within the administration law.

Matson v. Pearson, 97 S.W. 983, 121 Mo. App. 120.

Mo.App. 1914. The probate court may allow as part of the expenses of administration a reasonable fee to the administrator's attorney.

In re Lutz's Estate, 162 S.W. 679, 175 Mo.App. 427.

Mo.App. 1917. The issue, on a claim against a decedent's estate for services rendered it by an attorney employed by the administratrix, is the reasonable value thereof, notwithstanding any contract or admission by administratrix, as she cannot bind it thereby.

Mayhall v. Stoecker, 191 S.W. 1117.

Mo.App. 1931. Statute *held* not to preclude attorney rendering services to executrix as such from asserting claim by filing demand against estate. Rev.St.1919, § 220, V.A.M.S. § 465.100.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Executrix had right to contest claim for fees by attorney for executrix. Rev.St.1919, §§ 220, 2555, V.A.M.S. §§ 465.100, 484.030.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Mo.App. 1944. The statute contemplates allowance of attorney's fee for defending

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executor's final settlement, provided executor has faithfully discharged his duties, and in the main has rendered a true accounting though certain items are technically erroneous and other items are disallowed. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Flynn's Estate, 177 S.W.2d 694.

Where attorney rendered valuable services in defending executor's final settlement from exceptions other than those to allowance of attorney's own fees, attorney was entitled to compensation. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Flynn's Estate, 177 S.W.2d 694.

An attorney, who rendered valuable services in defnding executor's final settlement from exceptions, was not to be denied compensation merely because executor was an attorney. Mo.R.S.A. § 220, V.A.M.S. § 465.-100.

In re Flynn's Estate, 177 S.W.2d 694.

Where executor's final settlement was in the main correct, and no bad faith was charged as regards items disallowed, attorney was entitled to a reasonable fee for defending settlement against all exceptions except those to allowance of attorney's own fees. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Flynn's Estate, 177 S.W.2d 694.

Mo.App. 1946. It is common practice for an attorney who has rendered professional services for the benefit of a ward's estate to present his petition for allowance directly to the probate court, and the court may assume jurisdiction though there is no statute expressly authorizing such procedure.

In re Pfiffner's Guardianship, 194 S.W. 2d 233.

Mo.App. 1949. Attorney fees could not be allowed as expenses of administration incurred in estate of the insane person, where they were obligations of the heirs. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

Williams v. Patterson, 218 S.W.2d 156, 240 Mo.App. 131.

⇐217. Loans or advances to estate.

Mo. 1838. Testator's will appointed his wife devisee and executrix during her life or widowhood; and, after proving the will, the widow contracted several debts for the benefit of the estate, for which she gave her individual notes, and then married the plaintiff. *Held*, that the administrators of the estate, appointed by the county court after marriage of the widow, were liable to the plaintiff for the amount of the notes as so much money paid to the use of the estate.

Maupin v. Boyd, 5 Mo. 106.

⇐218-219.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐220. Claims purchased by persons interested in estate.

Mo.App. 1882. Where the surety on an appeal bond of an administrator, against whom the judgment was affirmed, bought the judgment, it remained enforceable against the estate.

Ferguson v. Carson, 13 Mo.App. 29.

⇐221. Evidence.

⇐221 (1). Presumptions and burden of proof.

Mo.App. 1921. Where one accepts valuable service from another, the law implies a promise to pay therefor; but the presumption which justifies an implied contract does not exist where the service is performed by one from whom the family relation existing between the parties raises a presumption that the services were gratuitous.

Smith v. Davis' Estate, 230 S.W. 670, 206 Mo.App. 446.

Mo.App. 1927. Burden is on defendant, in action against deceased maker's estate, to prove payment of note sued on.

Courtney's Estate v. Lanznar's Estate, 296 S.W. 269.

Mo.App. 1928. Where evidence showed deceased attorney had collected money for plaintiff, burden was on administrator to show payment.

Rhoades v. Robinson's Estate, 6 S.W.2d 1007, 222 Mo.App. 912.

Mo.App. 1942. A plaintiff seeking to enforce against estate a claim on notes alleged to have been executed by deceased during her lifetime must prove the execution of the notes.

Smith v. Staley, 156 S.W.2d 766.

Mo.App. 1945. The general rule that in suit for debt payment is affirmative defense, burden of proving which is on defendant, applies to claim against decedent's estate for services rendered to decedent, though there is ordinarily no way to produce evidence of payment of such claim, in view of statute precluding claimant from testifying as to her dealings with decedent. Mo.R.S.A. § 1887, V.A.M.S. § 491.010.

Ledbetter v. Allen's Estate, 188 S.W.2d 846.

⇐221(2). — Services rendered to decedent.

Services between persons in family relation are presumed to be gratuitous, and, to

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warrant a recovery therefor against a decedent's estate, an express contract, or an intention to charge by one and to pay by the other, must be proved.

Mo. 1917. Denny v. Brown, 193 S.W. 552.

Mo.App. 1908. Stone v. Troll, 114 S.W. 82, 134 Mo.App. 308.

Mo.App. 1909. Rose v. Mayers, 122 S.W. 769, 139 Mo.App. 246.

Mo.App. 1911. Baxter v. Troll, 133 S.W. 1188, 152 Mo.App. 557.

Mo.App. 1913. Hartley v. Hartley's Estate, 155 S.W. 1099, 173 Mo.App. 18.

Mo.App. 1913. Hyde v. Honiter, 158 S. W. 83, 175 Mo.App. 583.

Mo.App. 1913. Bowman v. Shelton, 158 S.W. 404, 175 Mo.App. 696.

Mo.App. 1913. Crowley v. Dagley, 161 S.W. 366, 174 Mo.App. 561.

Mo.App. 1914. In re Helpbringer's Estate, 162 S.W. 288, 175 Mo.App. 325.

Mo.App. 1917. Morrison v. Morrison, 196 S.W. 1082, 197 Mo.App. 527.

Mo.App. 1926. Elstroth v. Karrenbrock, 285 S.W. 525.

Mo.App. 1927. Goff v. Scoggin, 293 S.W. 480.

Mo.App. 1927. Wharton v. Denny, 296 S.W. 183, 222 Mo.App. 260.

Mo. 1899. Proof that decedent's second cousin, with his knowledge and approval, looked after his household and business affairs during the time for which she sued, and that such services were reasonably worth a certain sum per annum, establishes a prima facie case for the jury, the mere fact that she was related to deceased raising no presumption that she rendered the services gratuitously.

Sprague v. Sea, 53 S.W. 1074, 152 Mo. 327.

Mo. 1902. In an action on a quantum meruit against a decedent's estate, to recover for services rendered to decedent by plaintiff as a body servant and nurse, it appeared that plaintiff had served deceased for at least 12 years. There was no express or special agreement as to what should be paid therefor, but decedent furnished plaintiff all that was necessary for his personal expense, and was to set him up handsomely when he got through with him. *Held*, that no plea of payment having been made in the trial court, and the deceased having paid such expenses, dispensing with plaintiff's need of wages for support, his family not being dependent thereon, and having held out, as an incentive to good and faithful service, a handsome remuneration at the end, no presumption of payment arose because deceased was very wealthy, and there was no reason why he should not have paid plaintiff from time to time.

Ryans v. Hospes, 67 S.W. 285, 167 Mo. 342.

Mo. 1922. Though it is presumed that services rendered by a son to his father are rendered without intention they shall be paid for the son can recover on establishing a contract for the payment for such services and that contract may be implied from facts and circumstances from which the jury might find the deceased understood the services were not voluntary but were to be remunerated.

Brown v. Holman, 238 S.W. 1065.

Mo. 1934. Where family relation existed between decedent and claimants for services, claimants must prove, by direct or circumstantial evidence, agreement or mutual understanding that the services were to be paid for by decedent.

Chandler v. Hulen, 71 S.W.2d 752, 335 Mo. 167.

Mo. 1948. Where a family relation exists between decedent and claimant for services, no promise or agreement that services are to be paid for is implied from mere fact that services have been rendered and accepted, but prima facie the presumption is that such services were rendered gratuitously, casting upon claimant burden of rebutting the presumption.

Kopp v. Traders Gate City Nat. Bank, 210 S.W.2d 49, 357 Mo. 659.

Mo. 1951. Where claim against estate of deceased for services rendered, is resisted on ground that a "family relation" existed between claimant and deceased, fact that parties stood in any peculiar relation to each other, even though they had no ties of kinship, may have a very important bearing on presumptions arising in the case, and on burden of proof.

Wells v. Goff, 239 S.W.2d 301, 361 Mo. 1188.

Whenever relationship of claimant and deceased was such as to lead a reasonable person to believe that services rendered by claimant for deceased were performed gratuitously, then presumption is indulged that services were not to be paid for, and burden is cast on claimant to overcome such presumption.

Wells v. Goff, 239 S.W.2d 301, 361 Mo. 1188.

Mo. 1952. Where services were rendered to deceased by person not standing in family relationship, presumption is that services were not gratuitous.

Muench v. South Side Nat. Bank, 251 S.W.2d 1.

Mere fact that person who rendered services was grand-niece of person to whom services were rendered would not establish such family relationship as to give rise to presumption that services were rendered gratuitously.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1905. One suing a decedent's estate for compensation for work done to promote the welfare of a family to which he belonged has the burden of proving the work was to be paid for, but not so if no family relation existed.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Mo.App. 1906. Where a parent whose diseased condition required constant care was boarded and cared for by his son and daughter-in-law, the fact that he paid his board gave rise to no presumption that this payment was intended as full satisfaction for all services rendered him.

Fry v. Fry, 94 S.W. 900, 119 Mo.App. 476.

Mo.App. 1908. On a claim by decedent's daughter against his estate for services as his housekeeper, the burden was on her to make out a prima facie case showing that the services were not performed gratuitously.

Cole v. Fitzgerald, 111 S.W. 628, 132 Mo. App. 17.

Mo.App. 1913. In an action against an estate for services rendered the decedent by her granddaughter, plaintiff and decedent *held*, as a matter of law, members of the same family.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

Mo.App. 1913. The burden was on claimants to affirmatively show an express or implied contract for payment of compensation.

Burt v. Gabbert, 160 S.W. 838, 174 Mo. App. 521.

Plaintiffs could not recover merely upon showing that they intended to charge for the services, but must also show that decedent knew they intended to do so, and himself intended to pay for them.

Burt v. Gabbert, 160 S.W. 838, 174 Mo. App. 521.

Mo.App. 1916. Where claimants, who were closely related to deceased and were in destitute circumstances, became members of deceased's household and performed services, there is a presumption that such services were not performed for compensation, and substantial evidence of an agreement for compensation is required before it can be allowed.

Miles v. Whitesides' Estate, 183 S.W. 340.

Mo.App. 1917. The presumption that services rendered by one member of a family to another are gratuitous does not apply where the member rendering the services has married and lives separate from the other member, though under the same roof.

Kleinberg v. Kinealy, 193 S.W. 981.

Mo.App. 1919. In an action against a decedent's estate, brought by one who had been taken into the decedent's family when a child, to recover for services rendered decedent, the burden of proof was on plaintiff to show some promise or intention to pay for the services rendered.

Nelson v. Poorman's Estate, 215 S.W. 753.

Mo.App. 1921. Conceding that a decedent's statements showed an expectation to pay an orphan boy living with him for his services, where there was no evidence of any contemplated breaking of the relation previously established, or of any change in the relation, it must be presumed that the services subsequently rendered were performed for the same reason as those previously performed, and there can be no recovery for want of any showing that the boy did anything relying on such intention.

Smith v. Davis' Estate, 230 S.W. 670, 206 Mo.App. 446.

Mo.App. 1925. Plaintiffs had burden of proving facts sustaining legal presumption of their intention to charge for services rendered decedent.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Evidence *held* insufficient to overcome presumption that plaintiffs intended to charge for services rendered decedent.

Brunnert v. Boeckmann's Estate, 276 S.W. 89.

Mo.App. 1926. Presumption that personal services are gratuitous, where family relation exists, may be overcome by evidence that there was understanding that there should be compensation.

Smarr v. Smarr's Estate, 283 S.W. 461.

Mo.App. 1926. Claimant, in action for compensation for boarding or caring for person, must prove value of services.

Elstroth v. Karrenbrock, 285 S.W. 525.

Mo.App. 1927. Administrator must prove that services to deceased were gratuitous, unless family relation existed.

Lauf v. Wiegersen, 295 S.W. 495.

Evidence justifying deceased's belief that plaintiff's services were gratuitous cast burden on plaintiff to prove mutual agreement to pay.
Lauf v. Wiegersen, 295 S.W. 495.

Mo.App. 1927. Where parties' relation warrants inference that no charge was expected to be made for services rendered, burden is on claimant to show actual or presumed intent to charge and pay therefor.
Wharton v. Denny, 296 S.W. 183.

That claimant was decedent's sister-in-law is insufficient to raise presumption that services were rendered gratuitously.
Wharton v. Denny, 296 S.W. 183.

Mo.App. 1927. Burden is on administrator to prove that services accepted by deceased were gratuitous, where family relation did not exist.
Lauf v. Wiegersen, 297 S.W. 79.

Presumption is that services rendered deceased were gratuitous, where family relation existed, or where circumstances are persuasive that compensation was not intended.
Lauf v. Wiegersen, 297 S.W. 79.

Mo.App. 1927. Claimant against estate had burden to prove his own and deceased's intention that services rendered were to be paid for.
Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Mo.App. 1929. One making claim against estate for services to deceased member of family must show that he and deceased intended, at time he rendered services, that compensation should be made.
Broyles v. Byrne, 13 S.W.2d 560.

Mo.App. 1929. Between members of same family, presumption is that all ordinary services are gratuitous.
Garner v. McKay, 15 S.W.2d 908.

Presumption of gratuity did not apply to unusual and extraordinary care of invalid mother-in-law by son-in-law.
Garner v. McKay, 15 S.W.2d 908.

Presumption of voluntary service does not apply to money furnished to build on or improve property.
Garner v. McKay, 15 S.W.2d 908.

Mo.App. 1929. Recovery against estate on presumption that services were not rendered deceased gratuitously requires finding of no family relation.
Lauf v. Wiegersen, 21 S.W.2d 635.

Mo.App. 1932. Burden was on one filing claim against her brother's estate for services rendered him while living together to prove express or implied contract to pay therefor.
Roller v. Montgomery's Estate, 45 S.W. 2d 945.

Mo.App. 1935. Where personal relationship between claimant for services and deceased was such as to have led reasonable person to believe that services were gratuitous, presumption is that services were not intended to be paid for, irrespective of their value, and burden of overcoming presumption rests upon claimant.
Taylor v. Currie's Estate, 83 S.W.2d 194.

Mo.App. 1935. Law generally implies or presumes contract to pay reasonable value of services claimant rendered to decedent, where nothing to contrary is shown and no family relation existed between claimant and decedent.
Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Where family relation existed between decedent and claimant for services, claimant must prove, by direct or circumstantial evidence, agreement or mutual understanding that services were to be paid for by decedent.
Aldridge v. Shelton's Estate, 86 S.W.2d 395.

To recover for services rendered decedent in family relation to claimant, there must have been intention to pay and to receive pay, which can be inferred from circumstances from which jury might find that claimant and decedent understood that services were not voluntary, but were to be remunerated.
Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Mo.App. 1937. Stranger rendering services to deceased was not presumed to have rendered services gratuitously.
Murphy v. Pfeifer, 105 S.W.2d 39.

Mo.App. 1938. Where family relation existed between decedent and claimant for board, lodging, and services, burden of showing mutual understanding between claimant and deceased for payment was on claimant.
Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Where family relation existed between deceased and claimant for board, lodging and services, mutual understanding that services were to be paid for could be implied from any facts or circumstances.
Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Where family relation existed between deceased and claimant for services, law did not imply promise to pay for services, but prima facie presumption is that services were rendered gratuitously.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

The presumption that services rendered by claimant to decedent were rendered gratuitously because of family relation between parties was not conclusive, but affected only the burden of proof.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Mo.App. 1941. In child's action against parent's estate to recover for board and lodging furnished parent, who lived with child as a member of his family, the burden of proving the contract or mutual understanding with respect to payment, essential to recovery, was on the child.

Hurst v. Hurst's Estate, 151 S.W.2d 543.

Mo.App. 1941. The law presumes that services rendered by a child to its parent are gratuitous and, in absence of an express promise of compensation for such services, the child cannot recover therefor from parent's estate.

Witte v. Smith, 152 S.W.2d 601, 237 Mo.App. 639.

Mo.App. 1943. If a family relationship existed, law presumes that services by one to the other were rendered gratuitously, and claimant has burden of rebutting such presumption, although ordinarily where one performs services for another at latter's request without understanding as to remuneration law implies a promise to pay reasonable value thereof.

Manning v. Driscoll's Estate, 174 S.W.2d 921.

A claimant seeking to recover for services rendered to decedent had burden of proving existence of actual contract to pay, or facts from which existence thereof might be reasonably inferred.

Manning v. Driscoll's Estate, 174 S.W.2d 921.

Mo.App. 1945. Evidence that deceased had resided apart from niece and her family until shortly before he died, whereupon he was taken to niece's home solely because he could be better cared for there, and that deceased was not dependent on niece for support and contributed nothing to her household, was insufficient to establish as matter of law that deceased was member of niece's family so as to create presumption that services were rendered gratuitously.

Offord v. Jenner's Estate, 189 S.W.2d 173.

That plaintiff suing estate to recover for services rendered deceased was his niece, though not a member of his family, was a fact that jury could consider on issue whether services were intended to be gratuitous, since jury could find under evidence, without aid of presumption based on family relationship, that plaintiff's actions were prompted by affection for deceased and not in expectation of payment.

Offord v. Jenner's Estate, 189 S.W.2d 173.

That niece suing for services rendered to deceased brought out in evidence fact of deep affection between niece and deceased did not establish that case was tried on theory of family relationship within rule that services rendered by persons in such relationship are presumed to be gratuitous.

Offord v. Jenner's Estate, 189 S.W.2d 173.

Mo.App. 1947. Where claimant and decedent lived together in one household and as members of one family, services rendered to each other are presumed to be gratuitous and a promise to pay therefor will not be implied by law from mere rendition of such service and request therefor or acceptance thereof.

Trantham v. Gullic, 201 S.W.2d 522.

Where claimant and decedent lived together in one household and as members of one family, claimant seeking to recover for services performed for decedent has burden of overcoming presumption that such services were gratuitous by proof of an express contract, an implied contract or a mutual understanding between them at time of their rendition that such services would be paid for.

Trantham v. Gullic, 201 S.W.2d 522.

A claimant who was living together with decedent as a member of same household must show a mutual understanding that decedent intended and claimant expected to receive pay for services rendered in caring for decedent, even though services rendered are unusual and extraordinary in character.

Trantham v. Gullic, 201 S.W.2d 522.

Mo.App. 1948. In proceeding against testatrix' estate to recover for services rendered by claimant to testatrix as a financial agent and banker in the management of business affairs, claimant was not entitled to judgment for any specific amount in absence of any testimony in reference to the value

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of the services rendered, though case was tried to the court.

Boggess v. Cunningham's Estate, 207 S. W.2d 814.

Mo.App. 1948. Where a family relation exists between a claimant and deceased for whom he rendered services during deceased's lifetime, a presumption arises that services rendered were gratuitous and that recipient made no promise to pay therefor, and that claimant did not intend to charge, though such presumption is not conclusive, and may be rebutted by proof of an agreement or mutual understanding that services were to be compensated, and promise may be established by indirect evidence though such must be clear and convincing.

Farris v. Faris' Estate, 212 S.W.2d 71.

Burden is on a claimant for services rendered to a decedent not only to overcome the presumption of gratuitous services due to a family relation but also to prove an express contract pleaded, notwithstanding handicaps of proof due to disqualification of claimant as a witness. Mo.R.S.A. § 1887, V. A.M.S. § 491.010.

Farris v. Faris' Estate, 212 S.W.2d 71.

⇐221 (3). Admissibility.

Mo. 1888. In an action against an administrator on notes alleged to have been executed by his intestate, where the defense is want of consideration, in order to prove that, after the death of the intestate, no trace of such a sum as that alleged to have been borrowed could be found among the assets, the administrator may testify as to an inventory made by him of all the personal estate, and the reading of the names and amounts from such paper as part of his testimony is not reversible error.

Bogle v. Nolan, 9 S.W. 14, 96 Mo. 85.

Mo. 1891. In an action against a son to recover money and assets due his father's estate, evidence that defendant had a settlement with his brother after his father's death was incompetent, where it was not shown that such settlement had anything to do with the father's estate.

McCartney v. Finnell, 17 S.W. 446, 106 Mo. 445.

Mo. 1903. A writing signed by a father, in the presence of witnesses, expressing a wish that his son and daughter-in-law be paid from his estate for their care of him and his wife for several years preceding, is admissible, in an action after his death against his administrator by the son and daughter-in-law for remuneration for nursing the parents, as showing, not an express contract, but the father's intention, and whether the services were rendered gratuitously or under an implied promise.

Lillard v. Wilson, 77 S.W. 74, 178 Mo. 145.

Mo. 1928. In action for services rendered deceased, plaintiff could introduce deed to deceased's nephews to show there was no consideration, and could show deceased's condition, to show she intended to pay for services.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, evidence that deceased was estranged from nearest relative *held* admissible.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, admitting evidence that plaintiff brought lunches, etc., to deceased *held* not error.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, evidence regarding value of services of trained nurse *held* admissible.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, evidence that plaintiff supervised and managed certain improvements *held* admissible.

Wandling v. Broaddus, 10 S.W.2d 651.

Mo. 1934. Where family relation existed between decedent and claimants for services, declarations by decedent that when he passed away he wanted claimants to have all that he had for taking care of him manifested decedent's intention that claimants should be compensated, particularly where such statements were made in claimants' presence.

Chandler v. Hulen, 71 S.W.2d 752, 335 Mo. 107.

Mo. 1941. In proceeding by attorney on demand against estate of deceased client for legal services allegedly rendered in connection with defense of an insanity proceeding against client, petition, in suit by client to enjoin further prosecution of the insanity case, was admissible as proof of a fact in a chain of circumstantial evidence that defense of the insanity proceeding was part of a fraudulent scheme to deprive client of his property.

In re Thomasson's Estate, 148 S.W.2d 757, 347 Mo. 748.

In proceeding by attorney on demand against estate of deceased client for legal services allegedly rendered in connection with defense of an insanity proceeding against client, where records in habeas corpus proceeding by client's kindred showed that granting of writ was resisted by adventuress who had married client as part of a scheme

to defraud him of his property the records were admissible to show that defense of the insanity proceeding was part of scheme to deprive client of his property.

In re Thomasson's Estate, 148 S.W.2d 757, 347 Mo. 748.

In proceeding by attorney on demand against estate of deceased client for legal services allegedly rendered in connection with defense of an insanity proceeding against client, where payment was resisted on ground that defense was part of a scheme to defraud client of his property, evidence that in foreign insanity proceeding no evidence in regard to mental condition of client was introduced was admissible to show that such proceeding was a fraud and was brought for mere purpose of aiding in defense of domestic insanity case.

In re Thomasson's Estate, 148 S.W.2d 757, 347 Mo. 748.

Mo. 1952. In action by grand-niece against administrator of her grand-uncle's estate for reasonable value of services rendered to her grand-uncle, evidence of grand-uncle's express promise to pay an agreed compensation was admissible to show intention on part of grand-uncle to pay for services, and to show that grand-niece expected payment, and the value the parties put upon such services.

Muench v. South Side Nat. Bank, 251 S.W.2d 1.

Mo.App. 1903. In an action by a daughter-in-law of a decedent against his estate to recover for personal services, the will of the decedent, providing that if any child to whom a bequest had been made should be allowed a claim against the estate, the bequest should be diminished that much, was properly excluded; plaintiff neither being a child of the deceased, nor provided for in the will.

Allen v. Allen, 74 S.W. 396, 101 Mo.App. 676.

Mo.App. 1905. In an action for services rendered in caring for and nursing decedent through his last illness, a deed of land executed by decedent to plaintiff long prior to the rendition of the services, and before it could be anticipated that the particular services rendered would be needed, and inferentially shown by the evidence to have been made for another and different consideration, was inadmissible in evidence.

Birch v. Birch, 86 S.W. 1106, 112 Mo. App. 157.

Mo.App. 1905. Evidence that decedent, with whom plaintiff was living, said to her, when she was 10 or 11 years old: "Stay with me till you are grown. I will pay you well for it" is admissible to show a positive agreement between them for compensation for plaintiff's services.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Evidence that on the occasion of a picnic decedent, with whom plaintiff was living, told plaintiff that, if she would stay at home and help her on some extra work, she would pay her well for it, has no tendency to prove a contract to pay plaintiff for her services generally.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Mo.App. 1906. In proceedings to establish a claim against decedent's estate for money alleged to have been borrowed by decedent from plaintiff, a witness was asked what, if anything, did decedent say about plaintiff having any money, to which witness replied that decedent said he had got some money of plaintiff. *Held* that, though the question was objectionable, the answer was admissible to show that decedent had borrowed money of plaintiff.

Hammer v. Crawford, 93 S.W. 348.

Where, in proceedings to establish a claim against decedent's estate, no effort was made to show that in decedent's dealings with plaintiff there was any established system of business in their transactions that would authorize an inference that decedent promptly paid any indebtedness that might exist against him in favor of plaintiff, evidence that decedent's reputation was that of a man who promptly paid his debts was properly excluded.

Hammer v. Crawford, 93 S.W. 348.

Mo.App. 1906. In an action against an administrator for services rendered decedent, evidence of statements made by deceased in the presence of one of the plaintiffs as to the meritorious nature of plaintiffs' services, their right to be paid, and his purpose to do so, was competent evidence of an understanding between the parties that the services were to be paid for.

Fry v. Fry, 94 S.W. 990, 119 Mo.App. 476.

Mo.App. 1909. In an action by a daughter and her husband to recover from the estate of her mother compensation for services rendered the mother, plaintiffs admitted an indebtedness evidenced by a note given the mother by the husband. *Held*, that evidence of plaintiffs tending to show how the indebtedness originated was inadmissible.

Brinton v. Thomas, 119 S.W. 1016, 138 Mo.App. 64.

Mo.App. 1910. In an action to establish a claim against an estate, for diamonds, etc.,

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sold decedent, testimony was admitted that at about the time decedent purchased a diamond "stud" which was charged in the account sued on, a certain woman purchased a diamond ring at the same price, and that plaintiff, in the probate court, had identified a receipted bill given to the woman which showed that a diamond "stud" had been purchased by her and paid for by eight installments corresponding in amounts and dates with eight credits shown on decedent's account with plaintiff. *Held*, that the evidence was not relevant.

Pierce Loan Co. v. Killian, 132 S.W. 280, 153 Mo.App. 106.

Mo.App. 1913. In the absence of any statute to the contrary, a claim for services rendered may be proved by parol.

Bowman v. Shelton, 158 S.W. 404, 175 Mo.App. 696.

Mo.App. 1914. Evidence that her brothers and sisters were not opposed to the claim is inadmissible in support of a claim against an estate by decedent's daughter for services rendered him by her in the family.

In re Helpbringer's Estate, 162 S.W. 288, 175 Mo.App. 325.

Mo.App. 1919. In an action for services against the decedent's estate, brought by one who had been taken into decedent's family when a child, it was proper to exclude evidence as to what a son of decedent had told the witness with reference to what decedent had said she intended to give plaintiff as a share of the estate.

Nelson v. Poorman's Estate, 215 S.W. 753.

Mo.App. 1920. In an action against the administrator of the estate of a decedent, evidence as to the value of the services rendered was admissible where plaintiff went to live with decedent and her husband under an agreement that, if she would render services, etc., she should take the entire estate of the spouses.

Boldwin v. Lay, 226 S.W. 602.

In an action against the estate of decedent for services rendered under an agreement that plaintiff should for her services receive the entire estate at decedent's death, evidence as to the value of the property was admissible, for its value limited the recovery.

Boldwin v. Lay, 226 S.W. 602.

Mo.App. 1922. A statement by deceased that he expected to remember or take care of plaintiff in his will, while alone insufficient to entitle plaintiff to recover, may be considered on the question of whether there was an implied agreement.

Smith v. Collins, 243 S.W. 219.

Mo.App. 1923. On the trial of a claim for services rendered to decedent, it was not error to exclude evidence that plaintiff had made a prior claim against the estate which had been paid, where it appeared that the prior claim was for services rendered at the request of the executor after the probating of the will, so that it could have nothing to do with the claim in controversy.

Smith v. Collins, 247 S.W. 457.

Mo.App. 1924. The understanding of a decedent that he was expected to pay for services rendered by claimant for washing and ironing need not be shown by direct testimony, but may be shown by the circumstances.

Brunnert v. Boeckmann's Estate, 258 S. W. 768.

Mo.App. 1924. In a suit for the value of services rendered to a decedent during his lifetime, admission of immaterial evidence that he left no children or near relatives to inherit his estate, while excluding testimony that he left distant relatives, *held* prejudicial error.

Smith v. Sims, 258 S.W. 1032.

Mo.App. 1925. Evidence of services rendered to brother of decedent, who was a member of household, properly admitted.

Miller v. Smith, 275 S.W. 769.

Evidence of services rendered by daughter of plaintiff to deceased properly admitted.

Miller v. Smith, 275 S.W. 769.

Mo.App. 1925. Testimony that plaintiff was called when decedent became sick *held* competent.

Schwartz v. Mercantile Trust Co., 279 S.W. 253.

Objection to question as to number of times decedent's daughters called on her properly overruled.

Schwartz v. Mercantile Trust Co., 279 S. W. 253.

Mo.App. 1927. Testimony of witness that she endeavored without success to employ claimant while he was staying with deceased *held* immaterial in proceedings to establish claim for services.

Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Statements of deceased showing intention to bestow bounty on claimant for services rendered *held* competent.

Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Mo.App. 1929. Evidence as to reasonableness of charge for services rendered de-

ceased was properly admitted, in absence of pleading or proof of express contract.
Lauf v. Wiegersen, 17 S.W.2d 369.

Mo.App. 1929. Evidence as to demand filed by plaintiff's father against estate was properly rejected in suit to recover for services rendered deceased.
Lauf v. Wiegersen, 21 S.W.2d 635.

Evidence as to services rendered deceased was properly admitted regardless of whether services were included in claim of plaintiff's father against estate.
Lauf v. Wiegersen, 21 S.W.2d 635.

Mo.App. 1932. In action against decedent's estate for board, lodging, and services, exclusion of lease and checks made by decedent after period involved *held* not error.
Kneuven v. Berliner's Estate, 54 S.W.2d 494.

Mo.App. 1933. In daughter's action on claim for services rendered to deceased, evidence that daughter offered to waive claim if court would appoint her administratrix *held* properly excluded.
Miller v. Richardson, 56 S.W.2d 614.

Mo.App. 1933. In daughter's suit for services rendered deceased, excluding testimony that another daughter filed partition suit within half hour after decedent's death *held* not error; such evidence being immaterial.
Love v. Richardson, 61 S.W.2d 220.

In daughter's action for services rendered deceased, permitting claimant's husband to state that his oldest child was 28 years old and youngest 3 years old *held* not error, where another daughter without objection had testified that claimant had 10 children.
Love v. Richardson, 61 S.W.2d 220.

In daughter's action for services rendered deceased, refusal to permit questioning of claimant's husband respecting span of mules turned over to him by deceased *held* not error, since he was making no claim against estate.
Love v. Richardson, 61 S.W.2d 220.

Mo.App. 1934. In suit against administrator for services rendered deceased's daughter, checks and certificates of deposit aggregating about $18,000, purportedly given by deceased to plaintiff's husband, offered as tending to prove contract sued on was between deceased and plaintiff and her husband jointly, *held* properly excluded, where $18,000 greatly exceeded any amount possibly owing for services to daughter.
Helsley v. Ferguson, 67 S.W.2d 103, 228 Mo.App. 386.

Mo.App. 1934. In action against estate for services rendered deceased prior to her death, testimony of claimant as to statements concerning his claim made by him after appointment of administrator for estate *held* admissible.
Gamblin v. Wells' Estate, 75 S.W.2d 862.

Mo.App. 1935. In action by sister and her husband for services rendered deceased brother who was taken to her home to be cared for during last two and a half or more years of his life, admission of testimony of practical nurse and of trained nurse as to value of services of sister and husband *held* not error.
Whistler v. Bond, 87 S.W.2d 237.

Mo.App. 1936. In action against decedent's estate for personal services rendered decedent during his lifetime, evidence as to what decedent had said with reference to his intention to pay for services, and as to character of services, *held* admissible.
Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1940. In action on claim against estate based on contract whereby deceased agreed to pay plaintiff $1,000 if he and his wife would move into home of deceased and take care of him, it was proper to show the circumstances that existed were such that a man in deceased's condition would make such a contract.
Heathcock v. Wolfe, 136 S.W.2d 105.

In action on claim against estate based on contract whereby deceased agreed to pay plaintiff $1,000 if he and his wife would move into home of deceased and take care of him, permitting plaintiff's wife to testify that deceased would vomit on himself was not error.
Heathcock v. Wolfe, 136 S.W.2d 105.

In action on claim against estate based on contract whereby deceased agreed to pay plaintiff $1,000 if he and his wife would move into home of deceased and take care of him, testimony that witnesses heard deceased say that he would give house and stock and $1,000 if arrangement could be made with some one to come and live with him and take care of him until he died was admissible.
Heathcock v. Wolfe, 136 S.W.2d 105.

In action on claim against estate based on contract whereby deceased agreed to pay plaintiff $1,000 if he and his wife would move into home of deceased and take care of him, refusing to discharge jury because of allegedly improper testimony of witness who testified that her claim against deceased's estate had been settled was not error.
Heathcock v. Wolfe, 136 S.W.2d 105.

Mo.App. 1940. In proceeding on claim against estate based on note payable by deceased to his sister-in-law, in which legatee claimed that deceased had said just before his death that he did not owe anyone, note found in his safety deposit box addressed to executors to effect that every note they might find signed by deceased had nothing to do with will and should be paid as any other indebtedness was competent as expression from deceased that there were some notes that he owed.

Tarlton v. Johnson, 138 S.W.2d 49.

Mo.App. 1942. In action against executor on testatrix' alleged contract to pay plaintiff for services rendered, testimony of plaintiff's brother as to how many years deceased lived with witness on his farm before moving to plaintiff's home was inadmissible as immaterial in proving such contract.

Witte v. Smith, 162 S.W.2d 604.

Mo.App. 1943. Where deceased agreed to pay plaintiff $800 for caring for deceased's mother for her lifetime and executed a check for that amount which was not presented for payment before decedent's death, the check was competent evidence of the contract even though it was not necessary to attach it to the petition in action to recover on contract.

Baker v. Swearengin, 168 S.W.2d 473, transferred 174 S.W.2d 823, 351 Mo. 1027.

Mo.App. 1944. In a proceeding against decedent's estate for services as a farmhand, where a petition allegedly showing a contract price was withdrawn by leave of court and the case was tried on the theory of quantum meruit, evidence of the reasonable value of the services was properly admitted.

Savage v. Michalon's Estate, 176 S.W.2d 626.

In a proceeding against decedent's estate for services on decedent's farm, the inventories and appraisement in the estate which allegedly paraded its wealth before the jury, were properly admitted to show that the farm contained over 500 acres and that the services were necessary in harvesting crops, attending cattle, etc., and the evidence also tended to corroborate plaintiff's evidence by showing decedent's ability to carry out his alleged promise to keep plaintiff's wages for him until plaintiff grew old.

Savage v. Michalon's Estate, 176 S.W.2d 626.

In a proceeding against decedent's estate for services as a farmhand over a period of 31 years, evidence that plaintiff had shot and killed decedent was properly excluded as incompetent an immaterial.

Savage v. Michalon's Estate, 176 S.W.2d 626.

Mo.App. 1944. In action against executor for nursing services rendered decedent, testimony that after decedent's death, plaintiff secured another position paying $52 weekly was irrelevant, but admission thereof was harmless.

In re Stein's Estate, 177 S.W.2d 678.

In action against administrator on quantum meruit for nursing services rendered decedent, testimony as to decedent's agreement to buy farm for plaintiff was relevant to show understanding that plaintiff was to be paid for his services.

In re Stein's Estate, 177 S.W.2d 678.

Mo.App. 1945. In proceeding to recover compensation from deceased's estate for services rendered to deceased, testimony that deceased made a will, leaving his estate to plaintiff's sons and naming plaintiff as executor, and said that he intended to pay plaintiff for his services by will and made such will with oral understanding that sons would divide with plaintiff, was admissible to show deceased's intention to make bequest and his acknowledgment of indebtedness to plaintiff and his sons for services.

Runnels v. Allen's Estate, 184 S.W.2d 740.

The making of will containing bequest to one who has rendered services to testator is not alone proof that bequest is in payment for such services, but testimony as to testator's statement that he was making bequest as compensation for services is admissible to show his intention to make bequest as such payment, not as gift or gratuity, and his recognition of debt for services.

Runnels v. Allen's Estate, 184 S.W.2d 740.

Mo.App. 1947. Where claimant and decedent lived together in one household and as members of one family and concurrently rendering services to each other, the relative pecuniary value of the services rendered by each is not material in determining whether other compensation is to be received by either.

Trantham v. Gullic, 201 S.W.2d 522.

Mo.App. 1948. In action by a member of decedent's family to establish a claim for services rendered decedent during her lifetime, pecuniary value of the services rendered is immaterial to rebut presumption that such services were gratuitous.

Farris v. Faris' Estate, 212 S.W.2d 71.

Mo.App. 1951. In action against executor to recover on quantum meruit for services rendered by plaintiff to deceased under contract, which deceased had breached by discharging plaintiff, to pay plaintiff $10 a week and to leave plaintiff house and furniture by will, parol testimony as to contents of destroyed will, by which deceased gave house and furniture to plaintiff, and as to subsequent will by which deceased made other dispositions of her property, was properly admitted.

Brawley v. Harwell, 236 S.W.2d 419.

⇐221 (4). Weight and sufficiency.

Mo. 1920. In an action to establish a claim against a dead man's estate, the evidence, to entitle plaintiff to recover, must be so clear and strong as to satisfy the conscience of the court of the truth of plaintiff's allegations beyond a reasonable doubt.

Craddock v. Jackson, 223 S.W. 924.

Mo. 1923. In an action by the administrator of an indorser of a promissory note for contribution against the estate of another indorser, evidence *held* to warrant the rejection of a counterclaim based upon a collateral and independent contract of indemnity between plaintiff's decedent and defendant's decedent.

Quackenboss v. Harbaugh, 249 S.W. 940, 298 Mo. 240.

Mo. 1952. Evidence established that $17,500 fee for legal services rendered to estate by attorney was not based on express contract, as contended, but that executrix had merely agreed that such sum was reasonable.

In re Schield's Estate, 250 S.W.2d 151.

Mo.App. 1910. In an action to establish a claim against an estate, evidence *held* to sustain a verdict for defendant.

Pierce Loan Co. v. Killian, 132 S.W. 280, 153 Mo.App. 106.

Mo.App. 1917. In executor's action against insurance company for proceeds of policy on life of testator's son, who interpleaded against executor, claiming there was oral contract between father and himself giving him proceeds of policy if he survived certain period, evidence *held* insufficient to establish son's claim there was such contract.

Union Trust Co. of St. Louis v. Manhattan Life Ins. Co. of New York, 198 S. W. 491.

Mo.App. 1927. Evidence *held* to sustain verdict allowing joint recovery to husband and wife for care of deceased and loss of husband's salary.

Guthrie v. Fields, 299 S.W. 141.

Mo.App. 1939. In action against son's administratrix for services rendered in caring for father, evidence *held* to authorize verdict for claimant, as against contention that a settlement was shown by claimant's rendering account, occupying house after father's death, and paying rent to son.

Clark v. Meriwether, 123 S.W.2d 603.

Mo.App. 1951. While evidence of reasonable value of support furnished decedent's minor child by persons filing claim therefor against decedent's estate is ordinarily essential to recovery by them, trial court or jury may determine such question from its own knowledge, without aid of opinion evidence, where value of things furnished is matter of common knowledge and all facts and circumstances respecting character and extent of such things are in evidence.

In re Hartle's Estate, 236 S.W.2d 40.

Where evidence sufficiently showed manner in which persons filing claim against decedent's estate for value of necessaries furnished by them to decedent's minor daughter maintained such child, court should have reached its own conclusion as to reasonable value of such support, regardless of any lack of probative force in opinion testimony of claimants' witness as to such value, which was matter within common experience of people generally.

In re Hartle's Estate, 236 S.W.2d 40.

⇐221(5). — Services rendered to decedent.

Mo. 1897. In an action by an administrator against deceased's daughter to recover money received by her from deceased when insane, in which defendant claimed that the money was received for services rendered, plaintiff was entitled to judgment, where the only evidence of a contract was that, when they commenced living together, the agreement was that defendant was to do the work and her father was to pay the expenses, and there was no evidence that defendant expected pay for her services, when they were rendered, beyond the support she received from her father's means.

Kostuba v. Moeller, 38 S.W. 946, 137 Mo. 161.

Mo. 1902. Plaintiff served deceased, who was worth about $400,000, with no family, for at least 12 years, as his body servant and nurse; and, according to deceased, there was no express or special agreement as to what should be paid therefor, but "he furnished plaintiff all that was necessary for his personal expenses, and was to set him up handsomely when he got through with him." Deceased often expressed his partiality for plaintiff, and his recognition of the invalua-

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ble character of plaintiff's services; once saying that a question of money would not be an inducement to part with his services. About two years before his death, deceased gave plaintiff two sums, of $400 and $140, respectively, to pay for a home, a mule, and some farm implements, which the evidence showed were pure gratuities, without reference to payment for services. *Held*, in an action against the estate for the services, that defendant's demurrer to the evidence on the ground that, there being no express agreement the law would not imply a promise to pay plaintiff for his services, and that the personal expenses furnished plaintiff and the gifts were a performance of the express agreement, was properly overruled.

Ryans v. Hospes, 67 S.W. 285, 167 Mo. 342.

Mo. 1924. Evidence *held* to prove implied contract on part of deceased to compensate claimant for services.

Hodge v. St. Louis Union Trust Co., 261 S.W. 67.

Mo. 1925. Finding that son did not intend to charge mother for board and lodging authorized under evidence.

Wooldridge v. Bryan, 270 S.W. 658, 307 Mo. 234.

Mo. 1934. Where family relation existed between decedent and claimants for services, mere expressions of gratitude or intended generosity by decedent are insufficient to show agreement or understanding to pay for services, but an agreement to pay may be implied from facts and circumstances.

Chandler v. Hulen, 71 S.W.2d 752, 335 Mo. 167.

Mo. 1940. Where it appeared that attorney filing claim against deceased client's estate admitted that client was man of unsound mind, that he was held a virtual prisoner by party against whom attorney had instituted litigation on behalf of client, that such party had exercise undue influence over client, and that conversation in which client allegedly discharged attorney took place at a secluded country roadside rendezvous in presence of such other party, evidence established that termination of attorney's employment was not brought about by voluntary act of client nor caused by such misconduct of client as would make attorney's withdrawal necessary and therefore attorney was not entitled to recover additional fee from client's estate.

In re Thomasson's Estate, 144 S.W.2d 79, 346 Mo. 911.

Mo. 1942. In action by claimant against decedent's estate for reasonable value of services to decedent during his lifetime, evidence failed to establish agreement with decedent other than contract under which claimant was first employed at a fixed compensation per week to care for decedent.

Adams v. Othenin's Estate, 161 S.W.2d 415.

Mo. 1948. In overcoming presumption that services rendered by claimant to decedent were gratuitous arising out of family relation existing between them, claimant must prove either by direct testimony or by evidence from which it may be reasonably inferred that there was an agreement or mutual understanding that claimant was to be remunerated for services rendered.

Kopp v. Traders Gate City Nat. Bank, 210 S.W.2d 49, 357 Mo. 659.

Mo. 1950. In action for additional compensation on quantum merult theory for services rendered deceased, evidence sustained finding that plaintiff could not establish amount of work performed.

Parsons v. White, 231 S.W.2d 124, 360 Mo. 935.

Mo. 1951. Generally, as between strangers, a claim against the estate of deceased for services rendered and voluntarily accepted may be sustained on proof of rendition of the services.

Wells v. Goff, 239 S.W.2d 301, 361 Mo. 1188.

Mo.App. 1903. In a suit by a decedent's daughter against his estate for services, an instruction that plaintiff could not recover unless she showed, by a preponderance of evidence, that the services were performed under an express or implied contract to pay for them, was proper.

Shannon v. Carter, 72 S.W. 495, 99 Mo. App. 134.

Evidence in an action by a decedent's daughter to recover from his estate for services, examined, and *held* to warrant a finding that the services were rendered at the instance of the deceased, and upon his promise to pay.

Shannon v. Carter, 72 S.W. 495, 99 Mo. App. 134.

Mo.App. 1903. Evidence examined in an action by a daughter-in-law of a decedent against his estate to recover for personal services, and *held* sufficient to sustain plaintiff's cause.

Allen v. Allen, 74 S.W. 306, 101 Mo.App. 676.

A decedent's promise to pay his daughter-in-law for personal services need not be proven by direct testimony, but may be in-

ferred from circumstances of the particular case, and the nature of the services rendered.

Allen v. Allen, 74 S.W. 396, 101 Mo.App. 676.

In an action for services rendered decedent, evidence *held* to show that the services were rendered on an agreement that payment therefor would be made out of his estate.

Mo.App. 1904. Graham v. Rapp's Estate, 80 S.W. 42, 105 Mo.App. 590.

Mo.App. 1905. Birch v. Birch, 86 S.W. 1106, 112 Mo.App. 157.

Mo.App. 1916. Coates v. Dunnivant, 182 S.W. 821.

Mo.App. 1916. Hinshaw v. Raines, 185 S.W. 1192.

Mo.App. 1920. Rouden v. Heisler's Estate, 219 S.W. 691.

Mo.App. 1905. In an action for services rendered in caring for and nursing decedent, evidence *held* insufficient to show that decedent was a member of plaintiff's family.

Birch v. Birch, 86 S.W. 1106, 112 Mo.App. 157.

Mo.App. 1905. Though the family relation existed between plaintiff and decedent, evidence of declarations by decedent that she intended to pay plaintiff for her services, and that plaintiff knew of such intention and worked with it in mind, authorizes a finding of an agreement to pay therefor, warranting a recovery against the estate.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Evidence, in an action against a decedent's estate for services rendered, that plaintiff entered decedent's home on the statement of decedent to plaintiff's mother that, if plaintiff would come and live with her, she would do a good part for plaintiff, is not conclusive that plaintiff was taken as a member of decedent's family.

McMorrow v. Dowell, 90 S.W. 728, 116 Mo.App. 289.

Mo.App. 1908. Decedent's statement that he intended that his son should have all his property, etc., is some evidence of an understanding between them that the son should be paid for caring for decedent.

Stone v. Troll, 114 S.W. 82, 134 Mo.App. 308.

Evidence *held* to sustain a finding that services rendered by plaintiff in caring for his father were not gratuitous.

Stone v. Troll, 114 S.W. 82, 134 Mo.App. 308.

Mo.App. 1909. A contract by an invalid mother with a married daughter for reasonable compensation to the daughter for caring for her mother may be implied from the fact that services were rendered under a mutual understanding that they were not gratuitous, and the fact that the daughter's husband gave the mother a note for money he owed her at the time when the daughter and her husband claimed that the mother owed them jointly a sum in excess of the amount specified in the note is not conclusive evidence of the absence of an understanding on the part of the mother to pay for the care given her.

Brinton v. Thomas, 119 S.W. 1016, 138 Mo.App. 64.

Mo.App. 1909. An intention to charge and to pay for services between persons in family relation may be proved by circumstantial evidence.

Rose v. Mayes, 122 S.W. 769, 139 Mo. App. 246.

Evidence in support of a mother's claim for services against the estate of her deceased daughter examined, and *held* to justify the direction of a verdict for the administrator.

Rose v. Mayes, 122 S.W. 769, 139 Mo.App. 246.

Mo.App. 1910. Evidence, in a claim against a decedent's estate for services, *held* to show an agreement to compensate the claimant, though a niece of the deceased.

Taylor v. Hudson, 129 S.W. 261, 145 Mo. App. 377.

Mo.App. 1911. In an action by a nephew against the estate of his uncle for services rendered the uncle, evidence *held* to show that there was no contract between them, whereby the uncle agreed to pay for such services.

Brand v. Ray, 137 S.W. 623, 156 Mo.App. 622.

Mo.App. 1913. Evidence *held* to support a finding of an actual contract between a parent and adult children binding him to pay them for services rendered him.

Hartley v. Hartley's Estate, 155 S.W. 1099, 173 Mo.App. 18.

Though loose declarations to neighbors and friends, indicative of affection or gratitude on the part of a parent, are not sufficient to authorize a finding of an intention to pay for services rendered him by adult children, yet where there is coupled with them the parent's statement that he desires the children to be paid, a finding of intention to do so may be inferred.

Hartley v. Hartley's Estate, 155 S.W. 1099, 173 Mo.App. 18.

In proceedings by children to establish a claim against the estate of his deceased par-

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ent for services rendered, evidence *held* not to authorize a recovery.

Mo.App. 1913. McGrath v. Talty's Estate, 156 S.W. 826, 175 Mo.App. 9.

Mo.App. 1913. Mabary v. Mabary, 158 S.W. 690, 173 Mo.App. 437.

Mo.App. 1917. Morrison v. Morrison, 196 S.W. 1082, 197 Mo.App. 527.

Mo.App. 1918. Clow v. Wormington, 206 S.W. 415.

Mo.App. 1913. In an action against the administrator of plaintiff's stepfather for the value of board furnished the stepfather, evidence *held* sufficient to make a question for the jury as to whether there was a mutual agreement or understanding that the board was to be paid for.

Kingston v. Roberts, 157 S.W. 1042, 175 Mo.App. 69.

Mo.App. 1913. In an action by a granddaughter against the administrator of her grandmother's estate for services rendered in caring for the grandmother prior to her death, evidence *held* sufficient to warrant the jury in finding that there was a mutual understanding that the services should be paid for.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

A statement by a grandmother that her granddaughter was to be paid for taking care of her out of the estate after her death shows an intention to compensate the granddaughter and not to bestow a bounty upon her.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

Mo.App. 1913. Evidence in an action by a daughter and her husband against her father's estate to recover for services rendered *held* to show an implied agreement by decedent to compensate plaintiffs.

Burt v. Gabbert, 160 S.W. 838, 174 Mo. App. 521.

Mo.App. 1913. Evidence of declarations by plaintiff's mother that she wanted claimant well paid for the services performed in caring for her, and that her other daughters should have the balance of the estate, *held* insufficient to establish a contract to pay for the services enforceable against the mother's estate.

Crowley v. Dagley, 161 S.W. 366, 174 Mo. App. 561.

Mo.App. 1914. An expectation of a child to be provided for by her father's will does not establish a contract that she should be compensated for services rendered him by her in the family.

In re Helpbringer's Estate, 162 S.W. 288, 175 Mo.App. 325.

Mo.App. 1915. In an action against a decedent's estate by his grandson for services in working his farm and nursing him, evidence *held* sufficient to support finding that the parties had express understanding that the services should be compensated.

Biggerstaff v. Riley, 179 S.W. 744, 192 Mo.App. 92.

Mo.App. 1916. In a proceeding to charge the estate of a decedent with claim for services rendered by plaintiffs who became members of her household and attended to her affairs, evidence *held* insufficient to show the services were rendered under an agreement for compensation.

Miles v. Whitesides' Estate, 183 S.W. 340.

Mo.App. 1917. Where the evidence showed without conflict that the families of plaintiff and of decedent lived separately, the nonexistence of the family relation could be taken as established as a matter of law in a proceeding against an estate for services.

Kleinberg v. Kinealy, 193 S.W. 981.

Evidence not definitely showing when plaintiff became of age or authorizing a finding that there was a mutual understanding that she should be paid for her services, *held* not to warrant recovery for services rendered while plaintiff was a member of decedent's family, though he had stated that he would will his property to plaintiff.

Kleinberg v. Kinealy, 193 S.W. 981.

Mo.App. 1917. Evidence in action against an estate of a decedent *held* insufficient to prove an agreement by client to reimburse attorney for loss of fees sustained by latter in settlement with his former partner.

Korte v. Boynton, 196 S.W. 89.

Mo.App. 1919. In an action for services against an estate of a decedent by one who had been taken into decedent's home when a child as one of the family, evidence *held* to establish a family relationship between plaintiff and decedent as a matter of law notwithstanding that plaintiff was not related to deceased, nor legally adopted.

Nelson v. Poorman's Estate, 215 S.W. 753.

Mo.App. 1921. In an action against estate of decedent for reasonable value of services performed and supplies furnished decedent, evidence *held* not to warrant a verdict for the full amount given, but only for part thereof.

La Plant v. Chapman, 229 S.W. 823.

Mo.App. 1921. Where claimant's own evidence showed a right to charge for services rendered decedent by whom he was raised for only three or four years, and it ap-

peared that such services were worth from $12.50 to $15 a month where board and lodging was furnished, and that when he married and left decedent's home he had from $70 to $75, and received personal property from decedent worth between $800 and $1,000, a finding that he had not been paid in full was not justified by the evidence.

Smith v. Davis' Estate, 230 S.W. 670, 206 Mo.App. 446.

Before one who is a member of a family of another standing in the relation of parent to him can recover for services rendered such parent, there must be clear and convincing testimony of an express contract.

Smith v. Davis' Estate, 230 S.W. 670, 206 Mo.App. 446.

Mo.App. 1921. Evidence that the customary compensation for services was 10 per cent. of the amount collected and that the rent of the house belonging to deceased was $10 per month, but without evidence as to the amount of the rent collected by claimant, is insufficient to sustain a verdict authorizing recovery by him for services in collecting the rents.

Jones v. Munroe, 231 S.W. 1069.

Mo.App. 1922. In action by member of family of deceased to recover for services rendered, evidence *held* sufficient to support finding that plaintiff rendered services.

Baker v. Lyell, 242 S.W. 703, 210 Mo. App. 230.

Mo.App. 1922. In an action against an executor for board and room furnished deceased, evidence *held* to show an implied agreement between plaintiff and deceased that he would pay for the services being rendered.

Smith v. Collins, 243 S.W. 219.

In an action against an executor for board and room furnished deceased, evidence *held* not to show conclusively that the services were rendered gratuitously on account of family relationship.

Smith v. Collins, 243 S.W. 219.

Mo.App. 1923. Evidence *held* to show that plaintiff rendered to defendant's testator the services claimed by him in caring for testator's horses and for his building, that they were reasonably worth the amount charged therefor, and that they were rendered with the expectation of receiving payment therefor.

Smith v. Collins, 247 S.W. 457.

Mo.App. 1924. Where decedent lived on claimant's husband's farm, receiving board and lodging for services performed, and it could not be said as matter of law that services performed for him by her in the way of washing and ironing were done as a housewife or were part of the board and lodging, or that any family relationship existed between the wife and deceased, and the evidence warranted a finding by the jury that she intended to charge therefor, which decedent should have known, recovery can be had on an implied promise to pay for the washing and ironing.

Brunnert v. Boeckmann's Estate, 258 S. W. 768.

Mo.App. 1924. Testimony from which the jury reasonably might infer that services rendered to decedent in his lifetime by a girl taken into his home were not voluntary, but that she and deceased understood that she was to be remunerated, sufficiently discharged the burden imposed on her, by reason of the family relation, to prove a contract to pay.

Smith v. Sims, 258 S.W. 1032.

Mo.App. 1925. Intention to pay for services may be implied from facts and circumstances in evidence.

Miller v. Smith, 275 S.W. 769.

Mo.App. 1925. Payments on indebtedness without asking credit *held* not conclusively to show absence of intention to charge for personal services rendered deceased.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Evidence *held* to show deceased's incapacity to work, and that he intended to pay for his care while so incapacitated.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Implied promise of decedent to pay for services provable by circumstances.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Mo.App. 1926. Evidence *held* sufficient to warrant finding that decedent lived in family relation with plaintiff, his sister-in-law.

Smarr v. Smarr's Estate, 283 S.W. 461.

Mo.App. 1926. Promise to pay member of family for services rendered may be inferred from circumstances, but mutual intention must appear.

Elstroth v. Karrenbrock, 285 S.W. 525.

Evidence *held* to warrant reasonable inference that claimant's father-in-law intended to pay for services, and that she expected compensation, notwithstanding he did odd jobs on premises.

Elstroth v. Karrenbrock, 285 S.W. 525.

Mo.App. 1927. Evidence *held* insufficient to show contract of decedent employing plaintiff to sell store.

Goff v. Scoggin, 293 S.W. 480.

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Mo.App. 1927. Agreement to pay for services may be inferred from circumstances.
Wharton v. Denny, 296 S.W. 183, 222 Mo. App. 260.

Evidence *held* not to show relationship between sisters-in-law, justifying inference that one performed services for other gratuitously.
Wharton v. Denny, 296 S.W. 183, 222 Mo. App. 260.

Mo.App. 1929. Evidence *held* to support finding that claimant furnished money to pay for improvement of decedent's home.
Garner v. McKay, 15 S.W.2d 908.

Mo.App. 1929. Positive and formal proof of deceased's intention to pay for services rendered during his lifetime is not necessary.
Lauf v. Wiegersen, 17 S.W.2d 369.

Direct evidence of contract to pay for services rendered deceased during lifetime is unnecessary.
Lauf v. Wiegersen, 17 S.W.2d 369.

Mo.App. 1932. Evidence *held* to show family or similar relation between brother and sister filing claim against his estate for services rendered.
Roller v. Montgomery's Estate, 45 S.W.2d 945.

Mo.App. 1932. Evidence *held* to support court's finding that decedent agreed to pay his daughter for housework and other services rendered.
Hofmann v. Sawyer, 50 S.W.2d 674, 227 Mo.App. 149.

Mo.App. 1932. Evidence sustained finding in favor of claimant suing for board, lodging, and services furnished decedent, notwithstanding existence of family relation.
Kneuven v. Berliner's Estate, 54 S.W.2d 494.

Mo.App. 1933. Deceased's intention to pay for daughter's services could be proved by circumstances.
Miller v. Richardson, 56 S.W.2d 614.

Mo.App. 1935. Evidence *held* insufficient to show agreement between brother and sister urging claim against brother's estate to effect that sister was to be paid for services rendered brother after he became physically incapacitated.
Roller v. Montgomery's Estate, 80 S.W. 2d 246.

Mo.App. 1935. Where family relation existed between decedent and claimant for services, mere expressions of gratitude or intended generosity by deecdent are insufficient to show agreement or understanding to pay for services, but agreement to pay may be implied from facts and circumstances.
Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Mo.App. 1935. In action by sister and her husband for services rendered deceased brother, evidence supported finding that there was implied contract for compensation.
Whistler v. Bond, 87 S.W.2d 237.

Mo.App. 1936. Proof of contract to pay for personal services rendered decedent *held* unnecessary in action against decedent's estate, since law implied such agreement.
Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1937. In action by niece against administrator of estate of deceased aunt to recover for services rendered to aunt while aunt was living with her and her father, evidence sustained finding that services were performed under such circumstances as to give rise to presumption that aunt was to pay for them.
Patrick v. Crank, 110 S.W.2d 381.

Mo.App. 1938. Where family relation existed between deceased and claimant for board, lodging, and services, a mutual understanding that services were to be paid for could be established by indirect evidence.
Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Where family relation existed between decedent and claimant for services, it was enough for claimant to adduce evidence from which jury might find that claimant and deceased understood that services rendered were not voluntary but were to be remunerated.
Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Mo.App. 1938. Evidence *held* to sustain judgment for claimant against estate, for services rendered for decedent, on ground that the claimant was not a member of decedent's family, and hence did not render the services gratuitously as a member of the family.
Weisenborn v. Rutledge, 121 S.W.2d 309, 233 Mo.App. 464.

Mo.App. 1941. In child's action against father's estate to recover for board and lodging furnished father, who lived with child as member of his family for two-thirds of time during period of five years, conflicting evidence warranted finding that no contract or understanding existed between father and child with respect to payment for board and lodging, and hence precluded recovery by child.
Hurst v. Hurst's Estate, 151 S.W.2d 543.

For references to other topics, see Descriptive-Word Index

Mo.App. 1943. In suit for services allegedly rendered by plaintiff as an accountant in auditing books and filing income tax returns in connection with the estate of defendant's deceased husband, evidence sustained finding for plaintiff.

Kopp v. Moffett, 167 S.W.2d 87, 237 Mo. App. 375.

Mo.App. 1943. Evidence that claimant rendered services for aged greatuncle under mutual understanding that services would be paid for upon latter's death supported verdict for claimant against estate.

Runnels v. Allen's Adm'r, 169 S.W.2d 73.

Mo.App. 1944. In a proceeding against decedent's estate, evidence that except for short interruptions plaintiff had worked for 31 years as a farmhand for decedent, who was paying him at the reasonable rate of $1 a day, but was keeping the money for him until plaintiff grew old, was sufficient to take the case to the jury and to show a continuous running account. Mo.R.S.A. § 1019, V.A.M.S. § 516.160.

Savage v. Michalon's Estate, 176 S.W.2d 626.

In a proceeding against decedent's estate for services as a farmhand covering a period of 31 years with various short interruptions, evidence that the services were reasonably worth $1 a day sustained a verdict for $4,000.

Savage v. Michalon's Estate, 176 S.W. 2d 626.

Mo.App. 1946. In action on claim against estate for room, board and care, any permissible inferences to be drawn by jury from testimony of any given witness as to the nature and character of services rendered must be reasonable inferences.

Piburn v. Reed, 193 S.W.2d 789.

Mo.App. 1947. Where claimant and decedent lived together in one household and as members of one family, in order for claimant to recover for services rendered in caring for decedent, a mutual agreement to that effect must be shown by clear and convincing evidence, and the proof of a mutual understanding must consist of facts from which jury may infer existence of an agreement to pay.

Trantham v. Gullic, 201 S.W.2d 522.

Although mere expressions of gratitude or intended generosity on part of recipient are not alone sufficient to overcome presumption that services performed by claimant for decedent were rendered gratuitously arising out of family relation existing between them, the promise to pay may be implied from any facts which in their nature justify inference of an actual contract of hire or an actual understanding between parties to that effect.

Trantham v. Gullic, 201 S.W.2d 522.

Evidence was sufficient to rebut presumption that services performed for a period of over thirty years by claimant for decedent, who was her uncle by marriage and with whom she made her home, were rendered gratuitously.

Trantham v. Gullic, 201 S.W.2d 522.

Mo.App. 1948. Recovery by a member of decedent's family against decedent's estate for services rendered during decedent's lifetime can be had only under an express contract, as the law will imply none; and mere proof of the rendition of the services is not sufficient.

Farris v. Faris' Estate, 212 S.W.2d 71.

Whether declarations of a person since deceased regarding services rendered him are mere expressions of gratitude or intended bounty or are statements from which an inference may be reasonably drawn that an agreement existed to pay for such services may depend upon all the surrounding circumstances, and, in considering their effect as to sufficiency of proof of claim, evidence most favorable to claimant's contention and most favorable inferences therefrom are alone considered. Mo.R.S.A. § 1887, V.A.M. S. § 491.010.

Farris v. Faris' Estate, 212 S.W.2d 71.

Where claimant for services rendered decedent during lifetime gives up a home or other employment and comes to live with a parent or party from who remuneration is asked, or where such party goes and lives in the home of claimant and it is shown that he is receiving, because of such changed relation, valuable services, there will be required much less evidence from which a remunerative relation can be inferred than where claimant himself is recipient of a home and from which he derives much that is valuable in life.

Farris v. Faris' Estate, 212 S.W.2d 71.

Evidence was insufficient to sustain finding of understanding between claimant and deceased for compensation where claimant without invitation came to home of deceased, his aunt, because he had no other satisfactory home and for 27 years lived with her and received his bed and board and a place in the family group, notwithstanding he rendered extremely valuable services.

Farris v. Faris' Estate, 212 S.W.2d 71.

Mo.App. 1951. In suit to recover from testatrix estate for services allegedly rendered to testatrix by claimant as financial

agent and banker in management of her business affairs, evidence sustained adequacy of trial court's general judgment for plaintiff in amount of $2,240.

Boggess v. Cunningham's Estate, 240 S. W.2d 721.

⇐221(6). — Loans and advances.

Mo. 1925. Recovery against estate of mother for payments by son of nurses' expenses justified under evidence.

Wooldridge v. Bryan, 270 S.W. 658, 307 Mo. 234.

Mo.App. 1925. Evidence *held* to sustain claim of husband against deceased wife's estate as to money paid by claimant out of his own funds for taxes and insurance.

Costello v. Brune, 272 S.W. 1056, 217 Mo. App. 587.

Evidence *held* not to sustain allowance of husband's claim against deceased wife's estate.

Costello v. Brune, 272 S.W. 1056, 217 Mo. App. 587.

Mo.App. 1950. In proceeding against estate on claim for amount allegedly paid by husband on loan by Home Owners Loan Corporation to wife, evidence was insufficient to establish that claimant repaid loan as alleged.

In re Polizoe's Estate, 229 S.W.2d 293.

Husband seeking to recover on claim against wife's estate for amount allegedly paid by him on loan by Home Owners Loan Corporation to wife, was required to prove not only that he actually paid amount alleged but also to prove by clear and positive evidence that such payment was not intended to be a gift.

In re Polizoe's Estate, 229 S.W.2d 293.

⇐221(7). — Agreements by decedent to make will or other conveyance of property.

Mo. 1949. Evidence sustained finding that elderly widow without immediate relatives orally agreed to deed property to husband's niece in consideration of niece's living with her during her lifetime as companion and nurse, keeping and providing a home and performing all household duties notwithstanding claim that niece exercised undue influence and that widow was incapable of handling her affairs prudently.

Powers v. Mercantile-Commerce Bank & Trust Co., 217 S.W.2d 375.

Mo. 1950. Proof of mere disposition to devise or convey by way of gift or as a reward for services is not sufficient to establish such contracts authorizing recovery for breach but there must be shown a real contract to devise or convey made before acts or performance relied upon where had.

Parsons v. White, 231 S.W.2d 124, 360 Mo. 935.

Contract to devise in consideration of services rendered cannot be established by conversation either too ancient on one hand or too loose or casual on the other.

Parsons v. White, 231 S.W.2d 124, 360 Mo. 935.

In action for breach of oral contract to provide for plaintiff in deceased's will as additional compensation for services rendered, evidence justified judgment for defendant executor on ground that contract was not established.

Parsons v. White, 231 S.W.2d 124, 360 Mo. 935.

In action for breach of oral contract to make a devise for plaintiff as additional compensation for services rendered deceased's ill wife, fact that plaintiff, who had lived for nine years after deceased's wife's death in same community with deceased, had never asked deceased if he had made a will or if he could or would pay any additional compensation, was some evidence, adverse to plaintiff's claim.

Parsons v. White, 231 S.W.2d 124, 360 Mo. 935.

Mo.App. 1935. Evidence *held* insufficient to establish claim against estate based on ground that decedent had created an express trust for benefit of children of moneys which had come to him upon first wife's death.

Heinlein v. Heinlein, 79 S.W.2d 541.

⇐221 (8). — Partnership transactions.

Mo.App. 1907. Evidence that deceased, on his partner in the saloon business saying that they had run out of money, and that deceased better get some, about $300, left his place of business, saying that he would go up to P.'s saloon, and get it, and that on arriving there he said he wanted $300, and P., saying "All right," gave him that amount, nothing further, as to giving or surrendering evidences of indebtedness, being done, is sufficient evidence, as against the estate of deceased, to warrant a finding of a loan of the money to deceased.

Pitthan v. Schnaitman, 106 S.W. 103, 127 Mo.App. 29.

Mo.App. 1940. Claimant was entitled to verdict against estate of deceased member of firm under undisputed evidence that deceased and another were members of firm engaged in contracting and building and had entered into building contracts, that other

member of firm wrote on firm stationery to claimant in reference to purchase of building material, that truck driver called for material, that officer of claimant called firm on telephone, that other member of firm said that material was for firm, stated that truck driver was firm's agent and gave credit references, that officer investigated references, and that relying thereon he delivered material to truck driver.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo. App. 1028.

⇐221(9). —— Obligation evidenced by written instrument.

Mo. 1933. That deceased charged notes off in tax return as uncollectible *held* not evidence of release or discharge of maker.

Thompson v. McCune, 63 S.W.2d 41, 333 Mo. 758.

Mo.App. 1915. Evidence *held* to show consideration for instrument executed by decedent acknowledging receipt of $500 belonging to plaintiff.

Weber v. Jantzen, 180 S.W. 432.

Mo.App. 1922. On a claim by wife against her husband's estate, evidence that the husband had purchased four certificates of deposit in his wife's name by check drawn on a fund in her name, on which he had authority to draw checks, with a stipulation that the deposits in the name of decedent at the time of his death were the proceeds of that checking account, *held* to sustain a finding by the trial court that the four certificates of deposit belonged to the wife, and that the amount represented thereby was included in the deposits in the husband's name at the time of his death, so as to sustain a judgment allowing a claim in favor of the wife for amount of the checks.

Dacurso v. Dacurso's Estate, 239 S.W. 890.

Mo.App. 1928. Evidence *held* to show sufficient delivery of decedent's note for services rendered.

La Rue v. Ogden, 2 S.W.2d 203.

⇐221(10). —— Claims of executors and administrators.

Mo.App. 1921. On a claim by an administrator pendente lite against the executors for attorney's fees incurred by claimant, evidence *held* to sustain the finding of the circuit court that the services rendered by the attorneys for the administrator were not for the benefit of the estate.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

(B) PRESENTATION AND ALLOWANCE.

⇐222. Necessity for presentation in general.

⇐222(1). In general.

Mo. 1890. A demand against a decedent's estate not exhibited to the administrator and presented for allowance, pursuant to the requirements of the statute then in existence and applicable thereto, Gen.St.1865, pp. 502, 503, §§ 6, 15, could not be properly allowed.

Wernse v. McPike, 13 S.W. 809, 100 Mo. 476.

Mo. 1937. On debtor's death, creditors or claimants are relegated to procedure prescribed by administration law for presentation, allowance, and collection of their claims.

Wahl v. Murphy, 99 S.W.2d 32.

Demand against decedent's estate may be established or allowed either by giving statutory notice to administrator and thereafter presenting demand to probate court for allowance or by bringing action in court of record having jurisdiction of demand, making administrator party defendant, recovering judgment thereon against estate, and exhibiting copy of judgment to probate court for classification. Mo.St.Ann. §§ 184–190, pp. 115–123, V.A.M.S. §§ 464.030–464.080, 464.140.

Wahl v. Murphy, 99 S.W.2d 32.

Mo.App. 1894. Where, after a claim had been presented and allowed against the estate of a decedent, a surety paid part of the amount and then claimed the right of subrogation, which was consented to by the creditor, it was not necessary for such surety to present a claim for the amount so paid, as the whole amount had already been allowed.

Fisher v. Columbia Building & Loan Ass'n, 59 Mo.App. 430.

Mo.App. 1913. A claim by an adult son against the estate of his deceased father for services rendered pursuant to a specific agreement four years before the father's death is barred by limitations, when not filed until nearly two years after the death of the father.

Mabary v. Mabary, 158 S.W. 690, 173 Mo.App. 437.

The laws of Missouri recognize no claim against a dead man's estate except such as have been allowed by the probate court or established by some other court of competent jurisdiction, and duly classified by the pro-

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bate court, in view of Rev.St.1919, § 221, V.A.M.S. § 465.090.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 176, quashed State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411.

Mo.App. 1922. Koelling v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1922. Stadtmann v. Citizens' Bank of Warrenton, 237 S.W. 182.

Mo.App. 1926. Administratrix cannot dispense with filing of claim against estate by any agreement with creditor.

Harrison Mach. Works v. Aufderheide, 280 S.W. 711, 222 Mo.App. 474.

Mo.App. 1930. Notice and exhibition of demand against estate can be perfected only in manner provided by statute. Rev.St.1919, §§ 185, 186, 195, 196, V.A.M.S. §§ 464.030, 464.040, 464.160, 464.190.

Curtis v. La Force, 29 S.W.2d 191.

Claim cannot be allowed against estate without proper personal service upon executor or waiver in writing, or by appearance. Rev.St.1919, §§ 185, 186, 195, 196, V.A.M.S. §§ 464.030, 464.040, 464.160, 464.190.

Curtis v. La Force, 29 S.W.2d 191.

Mo.App. 1932. No claims are recognized against decedent's estate except those allowed by probate court or by judgment of some other court.

Curlee Clothing Co. v. Boxer, 51 S.W.2d 894.

Mo.App. 1938. A timely and proper exhibition for allowance is jurisdictional in the case of a creditor's demand against an estate in process of administration. Mo.St. Ann. § 187, p. 117, V.A.M.S. § 464.040.

Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

⇐222(2). Presentation as condition precedent to continuing suit.

Mo. 1937. Judgment rendered against deceased in his lifetime must be presented to probate court and classified.

Wahl v. Murphy, 99 S.W.2d 32.

⇐222(3). Knowledge of executor or administrator of existence of debt.

For cases from other jurisdictions, see other Key Number Digests.

⇐223. Statutory provisions.

C.A.Mo. 1949. State statutes relating to time and manner for exhibition of demands against estates of deceased persons are enacted in the interest of an orderly and expeditious administration of estates of decedents, and not for benefit of those who may happen to be appointed by probate court as representatives of such estates.

Zuckerman v. McCulley, 170 F.2d 1015.

Mo. 1902. The repeal, before the statute had run against plaintiff's demand, of the quoted words in Rev.St.1889, § 184, V.A.M.S. § 464.020, providing that all demands against a decedent's estate not exhibited "and presented to the [probate] court" in two years shall be forever barred (the remaining words constituting Rev.St.1899, § 185), left his demand, presented in due time by action against the executors in the circuit court, as allowed by section 187, and there reduced to judgment, subject to be barred only by the general statutes governing the limitation as to judgments.

Ryans v. Boogher, 69 S.W. 1048, 169 Mo. 673.

Mo.App. 1884. Rev.St.1879, taking effect November 1, 1879, changing the statute of 1865, providing that a claim must be exhibited to the administrator within two years, has no effect where the letters of administration had been granted and publication of notice made before November 1, 1879.

Garesche v. Lewis, 15 Mo.App. 565.

Mo.App. 1917. The provision of Rev.St. 1909, § 191, as amended by Laws 1911, p. 81, V.A.M.S. § 464.020, barring claims against estates not presented within one year from date of letters, where notice is published within ten days after letters, is not affected by the amendment of Rev.St.1909, § 82, by Laws 1911, p. 79, V.A.M.S. § 461.440, giving form of notice for publication, which states the one-year limitation as dating from the last publication.

C. H. Albers Commission Co. v. Vogelsang, 190 S.W. 1058, 196 Mo.App. 180.

The effect of Rev.St.1909, § 191, as amended by Laws 1911, p. 81, V.A.M.S. § 464.020, to bar within one year from date of letters, where notice is published within ten days after granting such letters, all claims against an estate, is not affected by publication in the form prescribed by Rev.St.1909, § 82, as amended by Laws 1911, p. 79, V.A.M.S. § 461.440, which states the limitation as one from the date of last publication.

C. H. Albers Commission Co. v. Vogelsang, 190 S.W. 1058, 196 Mo.App. 180.

⇐224. Claims which must be presented.

D.C.Mo. 1950. Where beneficiary of trust signed memorandum sales agreement and delivery of shares was conditioned on authorization of trustees to distribute the stock, the probate court would not have jurisdiction of suit in equity to establish right

of executor of foreign buyer to the stock against beneficiary's administrator and others, and failure to exhibit claim against beneficiary's administrator within one year did not bar maintenance of the suit. Mo.R.S.A. § 182, V.A.M.S. § 464.020.

Becker v. Buder, 88 F.Supp. 609, motion overruled 88 F.Supp. 616, affirmed 185 F.2d 311.

A judgment against a person in his lifetime need not be allowed as a demand against his estate, it being sufficient under the direct provisions of Rev.Code 1855, p. 157, §§ 26, 27, to file a transcript in the probate court.

Mo. 1858. City of Carondelet v. Desnoyer's Adm'r, 27 Mo. 36.

Mo. 1877. Brown v. Woody, 64 Mo. 547.

Mo. 1867. Rev.Code 1855, p. 151, art. 4, § 1, subd. 2, relating to the administration of estates, and postponing claims not presented in the first year, does not apply to judgments which were liens on the land, if the estate be insolvent.

Peters v. Holliday, 40 Mo. 544.

Mo. 1877. A judgment cannot be enforced by execution against the estate of a decedent, but must be presented to the court as a claim against the estate.

Brown v. Woody, 64 Mo. 547.

Mo. 1887. The claim of the trustees and creditors of a dissolved corporation, against stockholders, for unpaid stock, matures on the dissolution of the corporation, and, if not presented for allowance against deceased stockholders within the time of limitation, it is barred.

Garesché v. Lewis, 6 S.W. 54, 93 Mo. 197, affirming 15 Mo.App. 565.

Mo. 1890. Gen.St.1865, p. 502, § 5, provides that any person may exhibit his demand against an estate, by serving on the executor or administrator written notice of his claim, with a copy of the instrument or account on which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice. Page 502, § 8, provides that any person having a demand against an estate may establish it by the judgment of some court of record, in the ordinary course of proceedings, and exhibit a copy of such judgment to the court having probate jurisdiction. Page 504, §§ 26, 27, provide that the clerk of the probate court shall keep an abstract of all judgments of other courts filed, and of all demands established, in said court against such estate, which shall show their amount, date, class, and to whom payable; and that if any "judgment" of a court of record "be filed" in said court, and when "demands" are "allowed" against an estate, such court shall determine their class, and the clerk shall make an entry thereof in his abstract, and, when thus classed, the executor or administrator may satisfy such demands according to such classification. *Held*, that where a judgment was rendered against an administrator on an intestate's note, in a circuit court, the filing of the judgment in the probate court for classification was sufficient, without a presentation for allowance, as in case of simple "demands."

Wernse v. McPike, 13 S.W. 809, 100 Mo. 476.

Where a valid judgment has been rendered on a note, the note is no longer a demand to be presented for allowance against a decedent's estate.

Wernse v. McPike, 13 S.W. 809, 100 Mo. 476.

Taxes on the personal estate of a decedent, whether they accrued before or after his death are "demands," within Rev.St. 1879, c. 1, art. 9, which it is the duty of the administrator, under Id. § 184, subd. 3, to pay without presentation for allowance, and for which, if he fails to pay them, an action can be maintained.

Mo. 1891. State ex rel. Zeigenhein v. Tittman, 15 S.W. 936, 103 Mo. 553.

Mo. 1891. State ex rel. Zeigenhein v. Tittman, 15 S.W. 941, 103 Mo. 569.

Mo. 1894. State ex rel. Zeigenhein v. Tittman, 24 S.W. 1032, 119 Mo. 661.

Mo. 1922. A widow's claim against her deceased husband's estate for money turned over to decedent for investment on her account is not barred by her failure to exhibit it in the probate court during the administration proceedings, as required by Rev.St. 1909, c. 2, art. 7; such claim involving the establishment of a trust and an accounting, which, being matters of an equitable nature, are not cognizable before the probate court.

Orr v. St. Louis Union Trust Co., 236 S. W. 642.

Mo. 1937. Circuit court judgment, obtained by plaintiff in action on indemnity contract after death of one defendant, administrator of whose estate was properly made defendant, *held* entitled to classification by probate court and payable as allowed demand against estate. Mo.St.Ann. §§ 182, 184–190, 1104, 1142, pp. 108, 115–123, 1399, 1413, V.A.M.S. §§ 464.010, 464.060–464.080, 464.140, 511.350, 511.440.

Wahl v. Murphy, 99 S.W.2d 32.

Mo. 1938. Under will giving testatrix' attending physician $1,000 and providing that in addition thereto "I want my executors to pay him a reasonable sum for his services as my physician," claim of physi-

clan for an amount in excess of $1,000 would not be a "legacy" but a "debt against the estate," and hence claim for additional amount which was not filed within statutory period for filing of demands against the estate was barred.

Rowe v. Strother, 111 S.W.2d 93, 341 Mo. 1149.

Mo. 1943. A claim for attorney's fees for services rendered to an intestate's estate may be asserted directly in the probate court and initial presentation in the administrator's settlement for allowance of the credit to him is unnecessary. Mo.R.S.A. § 185, V.A.M.S. § 464.030.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

An attorney's claim for services rendered an intestate's estate is not a "demand" within the non-claim statutes and is not subject to classification. Mo.R.S.A. §§ 182, 186, V.A.M.S. §§ 464.020, 464.040.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Attorneys' claim for services rendered to administratrices before they were supplanted by decedent's executor upon discovery of his will was an "expense of administration" provable directly against the estate at final settlement thereof notwithstanding that administratrices' settlement to revocation which did not include the claim had been approved. Mo.R.S.A. §§ 48, 49, 185, 2450, V.A.M.S. §§ 461.550, 461.560, 464.030, 484.030.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1879. The sureties of an administrator are liable on a judgment rendered against him in an action brought by him for the possession of personal property, without a presentation of the judgment to the probate court for allowance and classification, since such a judgment is not capable of classification.

State, to Use of Walsh, v. Dailey, 7 Mo. App. 548.

Mo.App. 1900. Where an administrator or executor of a decedent is sued in the circuit court on a claim due from the decedent, it is not necessary that defendant should be served with a copy of the demand.

Gewe v. Hanszen, 85 Mo.App. 136.

Mo.App. 1902. A judgment rendered against a party in his lifetime must be exhibited to his administrator before securing an allowance and classification in the probate court.

Wencker v. Thompson's Adm'r, 69 S.W. 743, 96 Mo.App. 59.

Mo.App. 1906. Where a widow took charge of all her deceased husband's property, and continued to use and dispose of it as she pleased during her lifetime, her administrator could not be sued by her husband's administrator as for a conversion of such property in the absence of an identification of any of such property as coming into the hands of her administrator, but the remedy of the husband's administrator was by a proceeding in the probate court for the allowance of a demand against the widow's estate.

White v. Blankenbeckler, 92 S.W. 503, 115 Mo.App. 722.

Mo.App. 1914. In view of Rev.St.1909, § 190, and section 191 as amended by Laws 1911, p. 81, V.A.M.S. §§ 464.010, 464.020, a claim by the attorney of an administrator is not a demand against the estate within sections 190–220, § 464.010 et seq., but is to be treated as part of the costs of administration.

In re Lutz's Estate, 162 S.W. 679, 175 Mo.App. 427.

Mo.App. 1920. Charges against an estate arising and paid in the course of the administration may be allowed at final settlement under Rev.St.1909, § 239, V.A.M.S. § 465.170, and are not within section 230, requiring allowance before payment.

Thompson v. Thompson, 217 S.W. 863.

Mo.App. 1920. Mortgagee may take mortgaged chattels and sell them, as against an administrator of mortgagor, without having the debt allowed.

Rice's Estate v. Hudson, 225 S.W. 111.

Mo.App. 1924. Where defendant's decedent obligated himself as surety on bond for cost which had accrued in certain action and for which judgment was rendered, and for costs thereafter to accrue, it was a demand against his estate which should have been filed under Rev.St.1919, §§ 185, 186, V.A.M.S. §§ 464.030, 464.040, and, not having been filed in probate proceeding, it was barred.

Vermillion v. Coleman, 262 S.W. 431, 216 Mo.App. 239.

Mo.App. 1929. Judgment creditor after death of judgment debtor cannot have execution, but judgment must be satisfied through probate court.

Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

Mo.App. 1931. One claiming bonds found by executor in deceased's safe deposit box was not required to file claim in probate court for bonds.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 503.

Mo.App. 1932. Administratrix' duty to pay taxes on intestate's realty, where arising out of contract of sale with private purchaser, does not depend on formal allowance of purchaser's claim. Rev.St.1929, §§ 135, 138, 140, 162, 165, 182, V.A.M.S. §§ 462.320, 462.350, 462.370, 463.300, 463.350, 464.010.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

Mo.App. 1932. Charges for legal services arising in course of administration are not "demands" within statute requiring formal presentation.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Mo.App. 1935. Alleged agent of deceased spouses could not recover any money paid by her for wife by intervening in suit by wife's administrator on fraternal benefit certificate on husband's life, of which wife was beneficiary, but was required to present demand against wife's estate in probate court.

Foster v. Fraternal Aid Union, 87 S.W. 2d 669, 230 Mo.App. 477.

Mo.App. 1938. A claim by widow of husband dying without descendants, to personalty received by her during coverture and given to him by her with her written assent, is not a "demand against the estate," since a demand contemplates the relation of debtor and creditor, and the creditor who secures the allowance of his demand to the probate court according to creditors of the same class. Mo.St.Ann. § 325, p. 212, V.A.M.S. § 469.090.

Hax v. O'Donnell, 117 S.W.2d 667, 234 Mo.App. 636.

Mo.App. 1941. A surviving husband's proceeding wherein husband filed petition in probate court for an order declaring personal property held by deceased wife to be a trust for husband's benefit could not be considered as a proceeding under statute covering administrations and relating to allowances and classifications of demands against estates where proceeding did not comply with statutory requirements respecting filing of claims against estates. Rev. St.1939, § 181 et seq., Mo.St.Ann. § 182 et seq., p. 108 et seq., V.A.M.S. § 464.010 et seq.

In re Main's Estate, 152 S.W.2d 696, 236 Mo.App. 88, transferred 146 S.W.2d 597.

Mo.App. 1945. Under statutes, claims against decedent's estate must be exhibited to administrator, presented to probate court for allowance and established by proof, and, until a claim has been allowed by such court or established by judgment of circuit court or other court of competent jurisdiction and classed by probate court, administrator has no right to appropriate any assets of estate to payment of claim. Mo.R.S.A. § 221, V.A.M.S. § 465.090.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐225. Time for presentation.

⇐225(1). In general.

Mo. 1878. Where one of the signers of an appeal bond died before the appeal was determined, and final settlement of his administrator was had before such determination, there was no liability on the bond which could be presented as a claim against his estate in the probate court.

Sauer v. Griffin, 67 Mo. 654.

Mo. 1943. Expenses of administration may be presented at any settlement of a decedent's estate, yet, since they may accrue up to the end of administration and are not subject to the non-claim statutes, they must be asserted only at final settlement of the estate. Mo.R.S.A. §§ 182, 186, 220, 224, V.A.M.S. §§ 464.020, 464.040, 465.100, 465.110.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Where administratrices were ousted on production of decedent's will and will was contested, contest operated as an "appeal" from order admitting will to probate, and where decedent's nominee was granted letters testamentary and was appointed administrator pendente lite, the administratrices were suspended until the outcome of the will contest was known, and administratrices' attorneys were justified in waiting until the will contest had been decided to file their claim for fees, notwithstanding that administratrices' settlement to revocation, which did not include the claim had been approved. Mo.R.S.A. §§ 14, 48, 49, 185, 2450, V.A.M.S. §§ 461.090, 461.550, 461.560, 464.030, 484.030.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1877. Wag.St. p. 102, §§ 1, 5, providing that all demands exhibited within one year from the granting of the letters of administration of the estate of a decedent shall be in the fifth class, and all demands after the end of the year and within two years shall be in the sixth class, and declaring that any person who exhibits his demand by serving on the executor or administrator a notice stating the amount and nature of his claim with a copy of the instrument on which the claim is founded, and such claim shall be considered exhibited from the time

of service of such notice, can only be complied with so as to enable a claimant to have his claims placed in the fifth class, on the claimant commencing a suit within the first year or serving a written notice of his claim on the administrator or executor within the year.

Spaulding v. Suss, 4 Mo.App. 541.

Mo.App. 1883. Effect of Revision of 1879, See,

Ambs v. Caspari, 13 Mo.App. 587, memorandum.

Mo.App. 1885. A surviving partner administered on partnership estate, giving bond as such administrator; thereafter the surviving partner died, and the administratrix de bonis non of the partnership estate sued on the bond and recovered a judgment which the sureties paid. Afterwards the administrator of the last deceased partner sued the administratrix de bonis non and recovered a part of the sum which had been paid by the sureties. *Held* that on payment by sureties they became merely creditors of their deceased principal's estate, and hence their claim was barred in two years, under Rev. St.1879, § 185, requiring a demand against a decedent's estate to be made within two years after letters are granted, and the sureties were not thereafter entitled to recover the amount which the administrator of their principal had recovered from the administratrix de bonis non.

Bauer v. Gray, 18 Mo.App. 164.

Mo.App. 1913. Claim against estate of claimant's father for services rendered pursuant to specific agreement four years before death is barred by limitations, when not filed until nearly two years after death of father.

Mabary v. Mabary, 158 S.W. 690, 173 Mo. App. 437.

Mo.App. 1915. Executor *held* to have burden of invoking statute and showing claim against estate was barred by failure to present within time required.

Weber v. Jantzen, 180 S.W. 432.

Mo.App. 1926. Claim for negligent delay in selling cotton *held* barred by failure to assert it within year after sale of factor's administratrix. Rev.St.1919, § 182, V.A.M.S. § 464.020.

Boatmen's Bank v. Clarahan, 286 S.W. 140, 220 Mo.App. 332.

Mo.App. 1930. Where stranger to partnership is administrator, all demands must be exhibited to administrator and court for allowance and classification. Rev.St.1919, §§ 88, 89, 91, 182–186, 221, V.A.M.S. §§ 461.740, 461.750, 461.770, 464.020 et seq., 465.090.

In re Harr & Harr's Estate, 22 S.W.2d 200, 224 Mo.App. 6.

Mo.App. 1932. Claim against estate of insane person, dying within year after appointment of guardian, for services rendered prior thereto *held* not barred by failure to present it to guardian.

Hofmann v. Sawyer, 50 S.W.2d 674, 227 Mo.App. 149.

Claim against insane decedent's estate *held* not barred by limitations because not presented until five days after expiration of year from appointment of guardian for decedent, where 12 days elapsed after his death before appointment of administrator.

Hofmann v. Sawyer, 50 S.W.2d 674, 227 Mo.App. 149.

Mo.App. 1937. The probate court cannot proceed to adjudicate a claim upon its merits as against a plea of the bar of the special statute of limitation, unless it appears that the claimant has taken those timely procedural steps which are necessary to confer the jurisdiction upon the court which it purports to exercise. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

In the absence of an exhibition of a claim for classification, then the classification of the claim, if and when allowed, is governed, so far as the time element is concerned, by the time of the exhibition for allowance and presentment of the claim in the probate court. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 465.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Mo.App. 1938. The compliance with statute providing that any person may exhibit demands against estate by serving on executor or administrator notice of amount and nature of claim, with copy of instrument of writing or account on which claim is founded, does not toll one-year statute of limitations. Mo.St.Ann. §§ 186, 187, pp. 115, 117, V.A.M.S. §§ 464.030, 464.040.

Curtin v. Woolley, 114 S.W.2d 191.

Mo.App. 1939. Where father conveyed realty to daughter pursuant to agreement that daughter would make specified payments to son, action by son to establish equitable vendor's lien on property was not barred by failure of son to file claim in probate court against daughter's estate within one-year period provided by statute limiting time for filing claims against estate.

Mo.St.Ann. §§ 183, 187, pp. 111, 117, V.A.M.S. §§ 464.020, 464.040.

Sturdy v. Smith, 132 S.W.2d 1033.

The statutes of limitation referred to in statute providing that no suit, action or proceeding to foreclose a mortgage or deed of trust shall be maintained when the debt secured by such obligation has been barred by the "statute of limitations" are the general statutes of limitation and not the special statutes of limitation in the laws dealing with the administration of estates. Mo. St.Ann. §§ 183, 187, 865, pp. 111, 117, 1153, V.A.M.S. §§ 464.020, 464.040, 516.150.

Sturdy v. Smith, 132 S.W.2d 1033.

Mo.App. 1952. One year statute of limitations applies to proving of demands which are legal, whether such demands are established in probate court or in any other court of record. V.A.M.S. § 464.020.

Rhodes v. Rhodes' Estate, 246 S.W.2d 98.

⇐225(2). Computation of period of limitation in general.

Mo. 1849. The statute of limitations runs against executors and administrators.

Milan v. Pemberton, 12 Mo. 598.

Mo. 1856. The time limited for exhibiting claims against the estate of a person deceased does not begin to run against a claim resulting from a covenant of seisin and warranty implied in a statute deed of conveyance, until the title warranted is defeated by the occurrence of an event making the paramount title absolute, which before was contingent.

Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174.

Mo. 1865. When the administrator gives notice of the grant of letters, the statute of limitations in respect to claims against the estates of deceased persons continues to run, although the civil law is suspended.

Richardson v. Harrison, 36 Mo. 96.

Mo. 1883. Where notes were payable two and three years respectively after the deaths of M. and J., they did not become demands against the estate of the makers, under Rev.St.1879, § 189, until after the death of both M. and J., and until the happening of these events the two years within which demands are required to be presented against decedent's estates did not begin to run.

Tenny's Adm'r v. Lasley's Adm'rs, 80 Mo. 664.

Mo. 1920. Under Rev.St.1909, § 195, as amended by Laws 1911, p. 82, V.A.M.S. § 464.040, requiring exhibition of claims to administrator for allowance within one year, instead of presentation to the court within two years, as before, when construed in view of the previous distinction between exhibition for classification and exhibition for allowance and the purpose of the act to reduce the time for closing estates, the exhibition to an administrator for classification as required by section 191 as amended is not sufficient to entitle claimant thereafter to begin his action at any time within the general statute of limitations.

Home Ins. Co. v. Wickham, 219 S.W. 961, 281 Mo. 300, setting aside Home Ins. Co. of New York v. Wickham, 196 S. W. 385.

The second part of Rev.St.1909, § 195, as amended by Laws 1911, p. 82, V.A.M.S. § 464.040, authorizing presentation of a claim to the court at the term after its exhibition whenever exhibited during the term at which final settlement could have been made except for the exhibition, does not indicate that claims exhibited before that term may be enforced by action at any time within the general limitation statute, but merely gives the claimant who exhibited within the year too late to proceed in court within the year under sections 203 and 204 an additional term.

Home Ins. Co. v. Wickham, 219 S.W. 961, 281 Mo. 300, setting aside Home Ins. Co. of New York v. Wickham, 196 S. W. 385.

Mo. 1952. If demand against estate of decedent, in form originally filed in probate court, is wholly insufficient, it cannot be amended after expiration of statutory period of limitations so as to avoid statute of nonclaim.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1877. The time for proving claims against an estate under Wag.St. p. 102, § 5, placing in the fifth class all demands "legally exhibited within one year after the granting of the first letters on the estate," begins to run from the date of publication of notice, and not from the date of letters of administration.

Spaulding v. Suss, 4 Mo.App. 541.

Mo.App. 1881. Wag.St. p. 102, §§ 5, 6, provide that demands may be exhibited by notice to the administrator within two years, and where the demand has thus been exhibited it may be proved within three years from the granting of letters, and the Revision of 1879, Gen.St.1865, c. 123, § 6, was amended by changing the word "three" into "two." *Held* that, if it was the intention of the Legislature in the former statute to limit the time for proving claims to two

years, and the word "three" was inserted by mistake, the courts cannot correct it.

Hicks v. Jamison, 10 Mo.App. 35.

Mo.App. 1882. Rev.St. § 185, relative to the administration of estates of decedents, provides that all demands not exhibited in two years shall be forever barred, and that such two years shall begin to run from the date of letters of administration, where notice is published as provided in section 87, and in other cases the two years shall begin to run from the date of publication of the note. *Held*, that the special limitation of the statute does not begin to run until the debt becomes due.

Donnelly v. Hodgson, 13 Mo.App. 15.

Mo.App. 1884. As the claim of a creditor of a corporation against a stockholder who has not paid for his stock accrues on the insolvency and dissolution of the corporation, the claim must, on the death of the stockholder, be exhibited for allowance against the estate of the decedent within the time prescribed by law for the presentation of claims against decedents, or it will be barred.

Garesche v. Lewis, 15 Mo.App. 565.

Under the statute of 1865, in force at the time of the issuance of letters of administration on the estate of a decedent, a claim against the decedent must be exhibited to the administrator within two years or it will be barred.

Garesche v. Lewis, 15 Mo.App. 565.

Mo.App. 1902. An administrator may waive notice of the exhibition of a demand, in which event the date of waiver is deemed the date of exhibition; and where a demand has not been exhibited prior to its allowance by the probate court, and the administrator appeals therefrom the date of exhibition is held to be that of the appeal, so far as concerns the statute of limitations, —it being assumed that the appeal amounts to a waiver of any other exhibition of the demand.

Wencker v. Thompson's Adm'r, 69 S. W. 743, 96 Mo.App. 59.

Mo.App. 1903. Under Rev.St.1899, § 185, V.A.M.S. § 464.020, providing that all demands against the estates of decedents not exhibited in two years from the accrual thereof shall be barred, and that the action shall be deemed to accrue from the granting of letters of administration, where a cause of action accrues during administration the demand must be exhibited within two years from the granting of the letters, or it is barred.

State ex rel. Bain v. Browning, 76 S. W. 719, 102 Mo.App. 455.

Mo.App. 1912. Rev.St.1909, §§ 190–194, V.A.M.S. § 464.010 et seq., limiting the time for exhibiting claims against decedents' estates, are a special statute of limitations, not affecting the general statute, and a surety on a note paying a judgment thereon must file his claim for contribution against the estate of a deceased cosurety within five years from the payment, deducting the period between the cosurety's death and the granting of letters.

Hinshaw v. Warren's Estate, 151 S.W. 497, 167 Mo.App. 365.

Mo.App. 1917. A claimant's exhibition of claim to administratrix and presentation to probate court, though he later dismissed that action and commenced another, was sufficient to destroy effect of one-year limitation provided by Laws 1911, pp. 80, 81, amending Rev.St.1909, § 190, V.A.M.S. § 464.-010.

Home Ins. Co. of New York v. Wickham, 196 S.W. 385, set aside 219 S.W. 961, 281 Mo. 300.

Mo.App. 1922. An obviously clerical error in the date of the jurat affixed to the printer's affidavit of publication of notices of granting letters of administration will not stay the running of the statute limiting the time for filing claims.

Bolz Cooperage Corporation v. Beardslee, 245 S.W. 611, 211 Mo.App. 109.

Mo.App. 1926. Running of one-year statute, Rev.St.1919, § 182, V.A.M.S. § 464.-020, against claim for factor's negligent delay in selling cotton is not arrested by assignment of assets and claims of his estate by his administratrix.

Boatmen's Bank v. Clarahan, 286 S.W. 146, 220 Mo.App. 332.

Mo.App. 1932. Account for housework and other services during period of nearly 15 years continuously before death of one to whom rendered *held* single open running account, against which limitations did not begin running until date of last item.

Hofmann v. Sawyer, 50 S.W.2d 674, 227 Mo.App. 149.

Mo.App. 1932. That items of claim against decedent's estate were all on one side and lacked book entries *held* immaterial, as respects limitations.

Kneuven v. Berliner's Estate, 54 S.W.2d 494.

⊂225(3). Contingent and unmatured claims.

D.C.Mo. 1931. Statute of limitations for filing claim against decedent's estate *held* inapplicable to contingent liability on guaranty, where estate was closed prior to time

when default by principal debtor occurred. Mo.St.Ann. § 183, p. 111, V.A.M.S. § 464.020.

Leavenworth Savings & Trust Co. v. Newman, 52 F.2d 813.

Mo. 1887. While an inchoate and merely contingent demand need not be exhibited until there is a substantial right of recovery, claims capable of being exhibited, whether due or not, if running to certain maturity, are barred if not exhibited within the period limited by the administration law for their exhibition to the administrator. Rev.St. §§ 185, 189.

Garesché v. Lewis, 6 S.W. 54, 93 Mo. 197, affirming 15 Mo.App. 565.

Mo. 1896. Rev.St.1889, § 184, V.A.M.S. § 464.020, creating a bar to the presentation of demands against a decedent's estate after a certain time, does not apply to causes of action which did not accrue until after the administration closed.

State ex rel. Patterson v. Tittmann, 35 S.W. 579, 134 Mo. 162.

Mo. 1943. Claim against deceased trustee's estate for breach of trust was "contingent" until deceased's personal representative pursuant to order of equity court ascertaining assets of trust estate delivered such assets to a successor trustee, and hence action on deceased trustee's bond which was commenced more than a year after publication of notice of issuance of letters testamentary but within one year after decision in equity suit was not barred by statute requiring demands against decedents' estates to be exhibited within one year. Mo.R.S.A. § 182, V.A.M.S. § 464.020.

Kimpton v. Spellman, 173 S.W.2d 886, 351 Mo. 674.

A "claim is contingent" so that one year period prescribed by statute for exhibiting claims against estates of decedents does not begin to run while liability depends upon some future event which may or may not happen and therefore makes it uncertain whether there will ever be a liability. Mo. R.S.A. § 182, V.A.M.S. § 464.020.

Kimpton v. Spellman, 173 S.W.2d 886, 351 Mo. 674.

Mo.App. 1882. Rev.St. § 195, providing that the court shall not allow any demand against an estate unless the claimant file an affidavit that the balance claimed is "justly due," does not preclude the allowance of a valid claim, although such claim is not payable until a future time.

Cassatt v. Vogel, 12 Mo.App. 323.

Mo.App. 1884. Under Rev.St.1879, §§ 205, 206, relating to demands against the estate of decedent, a demand not due, but running to maturity, must be exhibited within the time prescribed for exhibiting claims, or the same will be barred.

Garesche v. Lewis, 15 Mo.App. 565.

Mo.App. 1890. Defendant's intestate offered plaintiff a fourth interest in the proceeds that might be recovered in a suit. Judgment in the suit was recovered by the administrator of the intestate. The judgment was recovered after the expiration of two years from the granting of letters of administration. *Held*, that plaintiff's right of action against the administrator to recover his share of the proceeds was not barred, as, when the existence of a future liability is uncertain, the claim is not covered by Rev.St.1879, §§ 205, 206, providing for the allowance of demands not yet due.

Morgan v. Gibson, 42 Mo.App. 234.

Mo.App. 1924. Under Rev.St.1919, § 182, V.A.M.S. § 464.020, requiring demands against an estate to be exhibited within a year from the granting of letters testamentary and the publication of notice, where a claim against an estate does not become absolute until after the granting of letters and publication of notice, claimant has a year from the date of accrual within which to present it.

Grigg v. Lively, 257 S.W. 187, 214 Mo. App. 473.

Mo.App. 1926. Consignor's defense that deceased cotton factor, who had made advances to him, was negligent in not selling cotton, *held* not barred by limitations in action brought by creditor of factor's estate within a year after sale of cotton and demand for payment. Rev.St.1919, § 182, V.A.M.S. § 464.020.

Boatmen's Bank v. Vandiver, 281 S.W. 144.

Mo.App. 1931. Statute of limitations does not begin to run against claims against estate unless notice of granting of letters is properly published, and even then not against contingent claims not becoming fixed within year after granting of letters. Rev.St.1919, § 182, V.A.M.S. § 464.020.

Kirk v. Metropolitan Life Ins. Co., 38 S.W.2d 519, 225 Mo.App. 756.

⇐225(4). Claims of executors and administrators.

Mo.App. 1948. Where letters testamentary were issued to executor by probate court June 29, 1942, and first grant of letters was regularly published on July 2, 1942, and on June 24, 1943, executor filed his personal claim against estate with clerk of probate court in vacation, and on June 28, 1943, probate court appointed an adminis-

For later cases see same Topic and Key Number in Pocket Parts

trator pendente lite of the estate, and administrator on that date endorsed in writing on executor's claim the administrator's waiver of service of any notice of presentation of the claim, executor's claim was legally exhibited and was not barred by one-year limitations. Mo.R.S.A. §§ 181, 182, 185, 186, 193–202, V.A.M.S. §§ 464.010–464.040, 464.150 et seq.

Boggess v. Cunningham's Estate, 207 S. W.2d 814.

⇐225 (5). Absence or nonresidence of claimant or personal representative.

Mo.App. 1914. Code Iowa 1897, § 3349, I.C.A. § 635.68, barring claims against decedents' estates for failure to file or give notice, *held* not to apply to claim of resident of this state, where the decedent has property in this state, notwithstanding Rev.St. 1909, § 1895, V.A.M.S. § 516.180.

Lipperd v. Lipperd's Estate, 163 S.W. 934, 181 Mo.App. 106.

⇐225 (6). Personal disabilities and privileges.

Mo.App. 1913. The exception in Rev.St. 1909, § 191, V.A.M.S. § 464.020, from the general limitation of two years for filing demands against a decedent's estate, whereby demands of married women need not be filed till two years after the removal of their disability, is not abrogated by the mere passage of the Married Women's Act, enabling a married woman to sue and be sued as though single.

Grier v. Robbins' Estate, 158 S.W. 389, 175 Mo.App. 604.

Mo.App. 1932. Statute barring claims not presented within year after issuance of letters of administration *held* inapplicable to married woman's claim, notwithstanding Married Woman's Statute. Rev.St.1929, §§ 183, 3003, V.A.M.S. §§ 451.250, 464.020.

Kneuven v. Berliner's Estate, 54 S.W.2d 494.

Married woman's claim against decedent's estate not filed within year *held* not barred by general limitation statute. Rev. St.1929, §§ 862, 868, V.A.M.S. §§ 516.120, 516.-170.

Kneuven v. Berliner's Estate, 54 S.W.2d 494.

That plaintiff's first husband died in 1917 did not start statute running against her claim against estate of father who died in 1928, where plaintiff remarried in 1923. Rev.St.1929, §§ 862, 868, V.A.M.S. §§ 516.120, 516.170.

Kneuven v. Berliner's Estate, 54 S.W. 2d 494.

Mo.App. 1946. A cause of action stated in amended petition, filed by curator of incompetent's estate over ten years after filing of his original petition and more than a year after granting of letters testamentary on a deceased defendant's estate, to recover amount paid defendant brokers for real estate mortgage bonds unlawfully purchased by curator, was not barred by five-year statute of limitations or statute of nonclaim, in view of statutes extending time to bring suits for incompetent persons. Mo.R.S.A. §§ 182, 418, 1014, 1020, V.A.M.S. §§ 457.310, 464.060, 516.120, 516.170.

Sontag v. Stix, 191 S.W.2d 988, reversed 199 S.W.2d 371, 355 Mo. 972, 170 A.L. R. 349.

⇐225(7). Extension of time.

Mo. 1920. The exhibition of claims to an administrator for allowance by instituting court proceedings thereon which were subsequently voluntarily dismissed does not entitle the claimant to commence another action on the claim after the expiration of a year.

Home Ins. Co. v. Wickham, 219 S.W. 961, 281 Mo. 300, setting aside Home Ins. Co. of New York v. Wickham, 196 S.W. 385.

⇐225 (8). Laches.

Mo. 1902. Though a judgment against executors is required by Rev.St.1899, § 208, V.A.M.S. § 464.100, to be filed in the probate court and there classified,—section 3177, § 513.075, prohibiting an execution against executors,—yet an appeal by executors from the judgment, operating as a supersedeas, having been taken, so that the probate court would not have had jurisdiction to classify it, failure to file it in the probate court till after affirmance on appeal is not laches.

Ryans v. Boogher, 69 S.W. 1048, 169 Mo. 673.

⇐225 (9). Claims not presented in time as claims against assets subsequently discovered or inventoried.

For cases from other jurisdictions, see other Key Number Digests.

⇐226. Notice to creditors.

Mo. 1847. The publication of the notice of the grant of letters of administration need not be completed within 30 days from the grant of letters. It is sufficient if it is begun in that time.

Montelius v. Sarpy, 11 Mo. 237.

Mo. 1850. If the publication of notice to creditors, required by the statute, be not commenced within 30 days from the grant

of letters of administration, debts against the estate are not barred after the lapse of three years.

Hawkins v. Ridenhour, 13 Mo. 125.

Mo. 1853. An administrator can rely on the statutory bar of three years to a demand against the intestate's estate, as provided by the administration law, only when he has given the notice in the manner and within the time prescribed by law.

Bryan v. Mundy's Adm'r, 17 Mo. 556.

Mo. 1860. An administrator cannot claim the benefit of the statute of limitations, who has neglected the notice of his appointment required by statute. Rev.Code 1855, p. 131, § 19.

Clark v. Collins, 31 Mo. 260.

Mo. 1875. A notice of the appointment of an administrator, requiring all persons having claims against the estate of the intestate to present them within one year from the date of the letters or they may be precluded from any benefit in the estate, and "if not presented within three years from the date of said letters they will be forever barred," is not sufficient notice within Wag. St. p. 86, § 19, prescribing that an administrator shall give notice requiring all persons having claims to exhibit them for allowance within one year, and if such claims be not exhibited within two years they shall be barred.

Wilson v. Gregory, 61 Mo. 421.

An administrator cannot avail himself of the limitation prescribed in the statute as a bar to a demand, unless he has given notice of his letters of administration in the manner and within the time directed by law.

Wilson v. Gregory, 61 Mo. 421.

Mo. 1884. Where the record in proceedings for the administration of an estate fails to show when, if at all, notice was given by the executor of his taking charge and beginning the settlement of the estate of his testator, the question of limitations within which claimants must present their claims does not arise.

Vosler v. Brock, 84 Mo. 574.

Mo. 1894. Unless an administrator makes publication of the granting of letters of administration for the time and in the manner required by law, the publication is invalid and constitutes no basis on which to rest the special statute of limitations.

Munday v. Leeper, 25 S.W. 381, 120 Mo. 417.

Mo.App. 1876. Notice of a grant of letters published by the administrator in German and in a German newspaper is not published in compliance with the law, and is of no effect, although parties interested all speak and read German.

Doerge v. Heimenz, 1 Mo.App. 238.

Mo.App. 1880. The administrator to avail himself of the bar of two years, must plead and prove that notice was given of the grant of letters as required by law, the bar being special and depending for its effect on such provisions of the statute.

Doerge v. Heimenz, 8 Mo.App. 255.

Mo.App. 1931. Statute of limitations does not begin to run against claims against estate unless notice of granting of letters is properly published. Rev.St.1919, § 182, V.A.M.S. § 464.020.

Kirk v. Metropolitan Life Ins. Co., 38 S.W.2d 519, 225 Mo.App. 756.

Mo.App. 1952. Under special section limiting time in which to bring action against an administrator on claims against an estate, in order to start the time running from date of granting of first letters of administration, notice must have been published within 10 days after the letters were granted. V.A.M.S. §§ 461.010 et seq., 461.440, 464.020.

Alexander v. Wyatt's Estate, 244 S.W.2d 121.

⇐227. Statement and verification of claim.

⇐227(1). Form, requisites, and sufficiency of claim.

Mo. 1838. The notice to an administrator of a demand against the intestate's estate must state the nature of the claim, and whether the claimant claims in his own right or in that of another.

Dorsey v. Burns, 5 Mo. 334.

Mo. 1857. That a demand is made out against an intestate by name instead of his estate or administrator, will not justify the refusal of evidence in its support.

Coots v. Morgan's Adm'r, 24 Mo. 522.

Mo. 1870. An affidavit attached to a note, that the estate "has been given credit for all judgments and offsets to which it is entitled on the demand above described, and the balance there claimed is justly due," *held* sufficient compliance with Gen.St.1865, p. 502, §§ 12–14, notwithstanding the objection that it did not show that the claimant was not indebted to the estate on other accounts.

Merchants' Bank v. Ward's Adm'r, 45 Mo. 310.

Mo. 1874. Wag.St. p. 103, §§ 12, 15, requiring a creditor claiming against an estate to make affidavit that all just credits and offsets have been allowed, does not apply

where the claim is made as a counterclaim by the creditor in a suit in a court other than the probate court to establish a claim against him in favor of the estate.

Stiles v. Smith, 55 Mo. 363.

Mo. 1897. No pleading other than the tax bill need be filed in the probate court on a demand for back personal taxes against the estate of a decedent, under Rev.St.1889, § 7626, V.A.M.S. § 140.730, providing that personal tax bills shall be presented and allowed against the estates of decedents in the same manner as other debts, and section 199, § 464.280, providing that the probate court shall determine all demands in a summary way without form of pleading.

State ex rel. Hayes v. Seehorn, 39 S.W. 809, 139 Mo. 582.

Mo. 1909. Where a claim against the estate of a decedent was on a note, the claimant could not recover on stating an account.

Keys v. Keys' Estate, 116 S.W. 537, 217 Mo. 48.

Mo. 1913. A notice of claim against a decedent's estate, describing the exact nature and extent of the indebtedness and containing a copy of the notes and judgment which was the basis of the claim, was not defective because it omitted to put the claim in the form of a statement of indebtedness against the estate.

Rassieur v. Zimmer, 155 S.W. 24, 249 Mo. 175.

Mo. 1926. Statement of facts sufficient to notify executor of nature of claim against estate is sufficient either in probate court or on appeal, nor is executor required to plead, in view of Rev.St.1919, § 197, V.A.M.S. § 464.-280.

Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.

Mo. 1927. Claim against decedent's estate in probate court *held* to contemplate accounting and judgment for amount found due.

Sandwich Mfg. Co. v. Bogie, 298 S.W. 56, 317 Mo. 972.

Mo. 1940. A demand filed in probate court is not to be judged by strict rules of pleading applied to petition in circuit court, and such a demand is sufficient if it gives reasonable notice to adverse party of nature and acceptance of claim made and if it is specific enough so that a ruling thereon will become res judicata of matters involved.

In re Thomasson's Estate, 144 S.W.2d 79, 346 Mo. 911.

Facts stated in claimant's demand filed in probate court against deceased's estate which are unfavorable to claimant stand as a judicial admission, the truth of which, in absence of some showing of innocent mistake on part of claimant, ought to be taken as established, especially where claimant himself is a lawyer.

In re Thomasson's Estate, 144 S.W.2d 79, 346 Mo. 911.

Mo. 1943. A claim against deceased's estate which alleged that deceased orally promised to leave claimant one-third of his estate in consideration of claimant's devoting her time to him and performing services of housekeeper, companion and secretary, that claimant in response to the promise performed the services requested until deceased's death 87 months thereafter, and that services were reasonably worth one-third of the estate, was sufficient to entitle claimant to recover reasonable value of her services in assumpsit.

In re Hukreda's Estate, 172 S.W.2d 824.

Mo. 1951. Where claimant's notice of demand stated that claim against estate was founded on account for money had and received, by deceased debtor from claimant, and set forth document which was made in France and which provided that debtor was indebted to claimant for monies advanced to debtor, that reimbursement could not be made in France where debtor and claimant resided because debtor's funds were blocked in United States, and that debtor in payment for monies advanced assigned to claimant certain sum of all funds, securities and credits belonging to debtor in possession of trust company in Missouri, even if pleadings were informal, the notice of demand and attached document stated a claim for money had and received, or for restitution.

In re De Gheest's Estate, 243 S.W.2d 83, 362 Mo. 634.

Mo. 1952. A demand filed in probate court is not to be judged by strict rules of pleading applied to a petition in circuit court.

In re Franz' Estate, 245 S.W.2d 1.

A demand filed in probate court is sufficient if it gives reasonable notice to adverse party of nature and extent of claim made and if it is specific enough so that a ruling thereon will become res judicata of matters involved.

In re Franz' Estate, 245 S.W.2d 1.

No formal pleadings are required in presentation of demands in probate court, nor on an appeal to circuit court.

In re Franz' Estate, 245 S.W.2d 1.

Statement in claim filed in probate court against estate of a decedent, "that under the terms and authority contained in said trust

agreement", decedent in her lifetime had engaged claimant attorneys to represent decedent, without any statement of such terms, amounted only to a legal conclusion.

In re Franz' Estate, 245 S.W.2d 1.

Where allegations of demand filed by attorneys in probate court against estate of a decedent specified that legal services for which recovery was sought were rendered by claimants to decedent at request of decedent, gave nature of services rendered, specified particular cases in which services were rendered and period when rendered and gave their reasonable value, listed credits and gave balance claimed, demand was sufficient, particularly as against motion to dismiss.

In re Franz' Estate, 245 S.W.2d 1.

Recitals in demand filed against estate of decedent for legal services rendered decedent during lifetime of decedent, that petitioners intended to allow as offsets and credits any amount collected through federal courts on motions and petitions there pending, and that filing of demand was precautionary measure so that demand would not be held to have been barred or foreclosed if federal court should make no allowance or ruling respecting fees of petitioning attorneys in matters pending before federal court, did not make claim conditional or contingent and did not invalidate prior statement of valid claim.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1876. Under the statute relative to claims against decedents' estates, the allowance of a credit by a claimant is not voluntary, but compulsory.

Knecht v. United States Sav. Institution, 2 Mo.App. 563.

Mo.App. 1878. Sufficiency of notice of claim to administrator. See

Pheiffer v. Suss, 5 Mo.App. 591, memorandum.

Mo.App. 1889. The statement of a claim against the estate of a decedent filed in the probate court was as follows: "For work done on farm and services rendered in attending to the business of deceased from Jan. 1, 1875, to Jan. 1, 1882, a period of seven years, at $240 per year, $1,680, which should be credited with amounts received from deceased or retained from sale of produce of farm by permission of deceased at various times extending over the seven years, $100 per year, $700. Balance due plaintiff, $980." *Held*, that the statement was sufficient

Wood v. Land, 35 Mo.App. 381.

Mo.App. 1898. A complaint filed against an estate is sufficient if it shows the nature and extent of the claim presented for allowance.

Walker v. Gay's Estate, 73 Mo.App. 89.

Mo.App. 1898. Though formal pleadings are not required in the probate courts, a claimant must give notice, in writing, containing a copy of his demand, to the administrator, Rev.St.1889, § 196, V.A.M.S. § 464.-190, or the latter may waive such notice, and the claimant must make oath in open court, or file affidavit, of the correctness of his demand before it can be allowed, Rev.St. 1889, § 194, V.A.M.S. § 464.150. The statutes contemplate that the demand must be evidenced by writing or reduced to writing, and have some tangible form and substance to it. A mere verbal claim will not satisfy the requirements of the law.

Williams v. Gerber, 75 Mo.App. 18.

Mo.App. 1903. No formal pleadings are required in the probate court, and if a demand against a decedent's estate is filed in such form as to unmistakably disclose the nature of the transaction, it is sufficient.

Monumental Bronze Co. v. Doty, 73 S.W. 234, 78 S.W. 850, 99 Mo.App. 195.

A demand against an administrator, who had waived service of notice thereof, showing the balance due and demanded, to which was attached the contract and order under which the claim arose, was sufficient.

Monumental Bronze Co. v. Doty, 73 S.W. 234, 78 S.W. 850, 99 Mo.App. 195.

Mo.App. 1903. Under Rev.St.1899, § 195, V.A.M.S. § 464.250, directing that the court shall not allow any demand against any estate unless the claimant make affidavit that he has given credit to the estate for all payments, and that the balance claimed is justly due, an affidavit presenting for allowance a note with credits indorsed thereon is not defective because the amount claimed to be due is not stated.

Woltemahr v. Doye, 76 S.W. 1053, 102 Mo.App. 133.

Mo.App. 1904. In probate courts formal pleadings in proceedings for the establishment of claims against decedents are not required, yet common justice requires that the statement of a matter about which those in charge of the estate probably know nothing should, when presented for allowance, be sufficiently full and specific to apprise them of the facts involved.

Corson v. Waller, 78 S.W. 656, 704 Mo. App. 621.

Mo.App. 1907. A statement of a claim filed in the probate court as follows: "To services rendered as per contract," between

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certain dates, "$200"—was sufficiently specific.

Smith v. Williams, 100 S.W. 55, 123 Mo. App. 479.

Mo.App. 1913. In view of Rev.St.1909, § 2119, V.A.M.S. § 511.260, prohibiting a reversal for want of allegations, the absence of which makes the pleading demurrable, or without proof of which verdict should not have been rendered, a statement of claim against an estate for legal services, which stated the general nature of the services, such as renting land, looking after its taxation, giving legal advice, etc., *held* sufficient to support a judgment for claimant.

Sandusky v. Courtney, 153 S.W. 1084, 168 Mo.App. 325.

Mo.App. 1915. Statement in the probate court for "board and nursing" might fairly be inferred to mean board and nursing of deceased.

Hays v. Miller's Estate, 173 S.W. 1096, 189 Mo.App. 72.

Claim or statement in probate court *held* sufficient to show the administrator what he has to defend against.

Hays v. Miller's Estate, 173 S.W. 1096, 189 Mo.App. 72.

Mo.App. 1916. In a suit for services rendered deceased in the way of care, an account in form of an itemized bill, stating that services were rendered at the request of deceased, *held* sufficient, having originated in the probate court.

Hinshaw v. Raines, 185 S.W. 1192.

Mo.App. 1920. A notice of claim that certain persons had a demand against the estate which failed to say anything about the presentation of the same at any time or place for allowance, purporting to be made by the "undersigned" while not in fact signed, was insufficient under Rev.St.1909, §§ 194, 203–205, V.A.M.S. §§ 464.030, 464.150, 464.160, 464.190.

Leven v. Morff, 226 S.W. 612, 205 Mo. App. 698.

Unless the notice of presentation of a demand against an estate required by Rev. St.1909, § 194, V.A.M.S. § 464.030, is waived by an administrator, notice in writing must be given as sections 203–205, §§ 464.150, 464.160, 464.190, contemplate.

Leven v. Morff, 226 S.W. 612, 205 Mo. App. 698.

Mo.App. 1925. Claim filed in probate court not subject to same strictness of pleadings as those filed in circuit court.

Feurt v. Lotspeich, 273 S.W. 240, 221 Mo.App. 355.

Claim against administrators for services rendered decedent *held* sufficient, though there were credits not shown thereon.

Feurt v. Lotspeich, 273 S.W. 240, 221 Mo.App. 355.

Mo.App. 1936. Demand for services rendered in caring for decedent which specified that services were rendered by claimant to decedent at his request, the nature of the services in substance, their frequency, period during which they were rendered, and their reasonable value, *held* sufficient. Mo. St.Ann. § 186, p. 115, V.A.M.S. § 464.030.

Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1939. Claim against decedent's estate for general housework performed for decedent between 1918 and 1930, which was presented March 16, 1936, did not disclose on its face that it was barred by general statute of limitations, even though the claim as filed did not negative the statute of limitations. Mo.St.Ann. §§ 198, 862, pp. 131, 1143, V.A.M.S. §§ 464.280, 516.120.

Broz v. Broz, 132 SW.2d 1039.

Mo.App. 1942. In proceeding on claim in probate court, all that is required is that the statement shall show the nature of the claim so that the administrator or executor may know what he has to defend against.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

⇐227 (2). Filing or attaching instrument or account on which claim is based.

Mo. 1885. Under Rev.St.1879, § 188, providing that a person having a claim against the estate of a decedent shall serve upon the executor or administrator a notice in writing stating the nature and amount of the claim with a copy of the instrument or writing or account upon which the claim is founded, a statement in the following form: "To services rendered from July, 1869, to February, 1872, $2,500" was insufficient.

Watkins v. Donnelly, 88 Mo. 322.

Mo. 1952. Demand filed by attorneys against estate of a decedent for money expended by attorneys on behalf of decedent during lifetime of decedent at request of decedent, to which demand an exhibit was attached which listed in detail, with dates, alleged outlays made by claimants on behalf of decedent, was sufficient to give reasonable notice to administrator ad litem of nature and extent of claim made, and was specific enough so that a ruling thereon would become res judicata of matters involved, and demand was sufficient as against motion to dismiss for failure to state claim upon which relief could be granted.

In re Franz' Estate, 245 S.W.2d 1.

For references to other topics, see Descriptive-Word Index

Mo.App. 1882. Rev.St. § 198, requires that notice of a claim given to an administrator shall be in writing and contain a copy of the instrument of writing or account on which the demand was founded. *Held* that, where a demand against a decedent was for goods purchased by himself and another as partners, an account showing the goods sold to the firm was proper.

Lenk Wine Co. v. Caspari, 11 Mo.App. 382.

Mo.App. 1882. Under Rev.St. § 198, requiring a party desiring to procure an allowance against the estate of a deceased person to deliver to the executor a written notice containing the copy of the instrument or account on which the demand is founded, a paper stating that the claim was founded on an account "of which the following is a copy: To Mdse., $720.71. Cr. of dividends of 50%, $360.35. Bal. Due, $360.36"—is not a sufficient copy of account.

Roethlisberger v. Caspari, 12 Mo.App. 514.

Mo.App. 1903. Under Rev.St.1899, § 197, V.A.M.S. § 464.150, providing that the claimant shall deliver to the executor a written notice containing a copy of the instrument or account on which his demand is founded, a notice to an executor of a claim founded on a note which fails to present a copy of the note is insufficient.

Woltemahr v. Doye, 76 S.W. 1053, 102 Mo.App. 133.

Under Rev.St.1899, § 188, V.A.M.S. § 464.030, providing that any person may exhibit his demand against an estate by serving on the executor a notice stating the amount and nature of the claim, with a copy of the instrument, the exhibition of a claim founded on a note which does not contain a copy of the note is insufficient.

Woltemahr v. Doye, 76 S.W. 1053, 102 Mo.App. 133.

Mo.App. 1906. Deceased was surety on a note for plaintiff, and on one occasion plaintiff handed him one-half of the amount of the note with a request that it be applied as a partial payment. Deceased stated that he needed the money for his own use and suggested a renewal of the note, which was done, after which plaintiff was compelled to pay the entire note. On another occasion plaintiff was to borrow money from another with deceased as surety, and, the money having been left for plaintiff with deceased, the latter failed to pay it over to plaintiff. *Held*, that plaintiff's cause of action against decedent's estate by virtue of such transactions was in assumpsit for money had and received and not on the notes, and hence he was not required by Rev.St.1899, § 188, V.A.M.S. § 464.030, to set out the notes in question in a statement of the claim.

Britian v. Fender, 92 S.W. 179, 116 Mo. App. 93.

A statement of claim under such circumstances, averring that decedent's estate was indebted to claimant, as of November 20, 1902, to $200 paid to deceased to be credited on the note of claimant and deceased, at a certain bank, which deceased failed to do, and on another date, "to money on Frady note," sufficiently showed the nature of the claim sued on as required by Rev.St.1899, § 188, V.A.M.S. § 464.030.

Britian v. Fender, 92 S.W. 179, 116 Mo. App. 93.

Rev.St.1899, § 188, V.A.M.S. § 464.030, provides that demands against a decedent's estate must be in writing and must state the amount and nature of the claim, with a copy of the instrument or writing, or account on which the account is grounded. *Held*, that such requisites are jurisdictional and must be substantially complied with.

Britian v. Fender, 92 S.W. 179, 116 Mo. App. 93.

⇐227 (3). Verification.

Mo. 1850. The affidavit in support of a claim against the estate of a deceased person can be made by an agent of the creditor only when he had the management and transaction of the business out of which the demand originated.

Peter v. King, 13 Mo. 143.

Mo. 1860. Under 1 Rev.Code 1855, p. 154, § 12, providing that the county court is not authorized to allow a claim against the estate without an affidavit by the claimant, the affidavit taken may be made ore tenus. Hence, on appeal from the probate court, it is no objection to the record that it did not show that the affidavit was filed or made in open court.

Kincheloe v. Gorman's Adm'rs, 29 Mo. 421.

Mo.App. 1881. On appeal from the allowance of a claim against an administrator, it cannot be contended that the record does not show that the affidavit, required by Rev. St. § 195 to be made by the claimant, was made, as such affidavit may be made ore tenus, and it is no part of the evidence.

Million v. Ohnsorg, 10 Mo.App. 432.

Mo.App. 1882. An affidavit in support of a claim against the estate of a decedent need not be in the words of the statute, Rev. St. §§ 195, 197, but it is sufficient if it substantially complies with the requirements.

Lenk Wine Co. v. Caspari, 11 Mo.App. 382.

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Mo.App. 1900. In a suit on a note against an administratrix, a copy of the note was filed with the original petition sworn to by plaintiff's attorney. Plaintiff filed an amended petition by declaring against defendant as executrix, and filed with the amended petition a copy of the note sworn to by himself. *Held* a sufficient compliance with Rev.St.1889, § 2088, V.A.M.S. § 509.130, relating to the verification of claims sued on in actions against an executrix or administratrix.

Gewe v. Hanszen, 85 Mo.App. 136.

Mo.App. 1904. An affidavit by an agent in support of a claim against a decedent's estate is not defective for not stating that he had the management of the business out of which the demand grew, or had means of knowing the verified facts—matters which may be shown aliunde—but it is defective if it does not state, as required by Rev.St.1899, § 196, V.A.M.S. § 464.260, the fact that it was made by an agent.

Dawson v. Wombles, 78 S.W. 823, 104 Mo.App. 272.

Mo.App. 1905. Under Rev.St.1899, § 195, V.A.M.S. § 464.250, providing that the court shall not allow any claim against any estate, unless the claimant first make oath in open court or file his affidavit that he has given credit to the estate for all payments and offsets and that the balance claimed is justly due, etc., such verification is a condition precedent to the court's exercise of jurisdiction to allow the claim.

Fitzpatrick v. Stevens, 89 S.W. 897, 114 Mo.App. 497.

Mo.App. 1915. Verification of a statement against the estate of a deceased person, giving her maiden instead of her married name, *held* not fatal.

Hays v. Miller's Estate, 173 S.W. 1096, 189 Mo.App. 72.

Mo.App. 1925. Statute relating to presentation of claims against estate construed.

Feurt v. Lotspeich, 273 S.W. 240, 221 Mo.App. 355.

Mo.App. 1927. Claim by administrator against another estate on notes maturing before his intestate's death need not be supported by affidavit. Rev.St.1919, §§ 192, 193, V.A.M.S. §§ 464.250, 464.260.

Courtney's Estate v. Lanznar's Estate, 296 S.W. 269.

Mo.App. 1938. The statutory requirement, that a claimant against an estate shall file an affidavit or make oath in open court in verification of demand before court may allow such demand, is jurisdictional upon question of right of court to entertain and allow demand. Mo.St.Ann. § 193, p. 127, V. A.M.S. § 464.250.

St. Louis Fire & Marine Ins. Co. v. Wagoner, 119 S.W.2d 1007.

Where insurance company took no part in presentment of demand against deceased agent's estate for money collected for, but not paid to, company, and demand was filed by administratrix without company's filing affidavit, or making oath in open court, in verification of demand, as required by statute, allowance for demand was void, since court was without jurisdiction to allow demand, and court's order that such demand be placed in demands of fifth class was not res adjudicata against company. Mo.St.Ann. § 193, p. 127, V.A.M.S. § 464.250.

St. Louis Fire & Marine Ins. Co. v. Wagoner, 119 S.W.2d 1007.

⇐227(4). Defects, objections, and waiver.

Mo.App. 1903. Under Rev.St.1899, § 199, V.A.M.S. § 464.190, providing that an executor may appear in court, or by writing waive the service of any notice of a claim, the voluntary appearance of an executor in court without any objection to the insufficiency of the notice of the claim is a waiver of it.

Woltemahr v. Doye, 76 S.W. 1053, 102 Mo.App. 133.

Mo.App. 1914. Where there was no request for a more definite statement of the services rendered by an attorney, his motion for compensation for services rendered an administrator *held* sufficient.

In re Lutz's Estate, 162 S.W. 679, 175 Mo.App. 427.

Mo.App. 1915. Demand or statement in the probate court *held* aided by counterclaim.

Hays v. Miller's Estate, 173 S.W. 1096, 189 Mo.App. 72.

Mo.App. 1915. Demand filed in probate court embodying claim for services about decedent's farm, nursing, and for board and provisions furnished, unattacked by motion before trial as too indefinite and uncertain, the point first being raised by objection to evidence, *held* sufficient.

Biggerstaff v. Riley, 179 S.W. 744, 192 Mo.App. 92.

Mo.App. 1920. A writ of summons issued by a judge of the probate court ordering administrator to appear on a certain day to answer a certain claim cannot supply the element of intention to present such claim for allowance missing in a notice of claim under Rev.St.1909, §§ 194, 203–205, V.A.M.S. §§ 464.030, 464.150, 464.160, there being no law authorizing the court to issue such a summons, and administrator being bound

only by the notice the statute requires to be served upon him.

Leven v. Morff, 226 S.W. 612, 205 Mo. App. 698.

Mo.App. 1927. Demand filed by husband and wife in probate court for care of deceased and reimbursement for husband's loss of salary, *held*, after verdict for plaintiffs, not to involve improper joinder.

Guthrie v. Fields, 299 S.W. 141.

Mo.App. 1936. Alleged insufficiency of demand against decedent's estate *held* waived by failure to file motion to require demand be made more certain in circuit court on appeal from judgment of probate court, wherein motion to make demand more certain was made. Mo.St.Ann. § 186, p. 115, V.A.M.S. § 464.030.

Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1945. Where there was no motion that claim for services rendered decedent be made more specific, and answer pleaded contract with claimant and husband for services to decedent and alleged that both had been paid in full, and claim stated nature of services, but not that plaintiff had personally rendered them, the claim would be held good after verdict and judgment for claimant, although based in part upon an assignment by claimant's husband.

Rudloff v. Werkheiser's Estate, 190 S.W. 2d 279.

⇐227(5). Amendment.

Mo. 1890. Service of the process of a court not having jurisdiction of an action against an administrator is not an exhibition of a demand against the estate which can be amended after the time limited for exhibiting the demand.

Wernse v. McPike, 13 S.W. 809, 100 Mo. 476.

Mo.App. 1904. An affidavit by an agent in support of a claim against a decedent's estate, defective for failure to disclose that it was made by an agent, may be cured by amendment.

Dawson v. Wombles, 78 S.W. 823, 104 Mo.App. 272.

Mo.App. 1908. Where a claim for funeral expenses was filed by a corporation, and, on appeal to the circuit court, a plea to the jurisdiction was preferred because the claim was verified by W. as an individual, and not as agent of the corporation, the court properly overruled the plea, and permitted the filing of an amended affidavit by W. as president of the corporation; such not being a jurisdictional defect.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

Under the statute allowing claims against estates to be verified either by affidavit or by oath in open court, if a written affidavit is filed from which a requisite fact is omitted, it may be supplied by an oral oath which need not appear of record.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

⇐227(6). Issues, proof, and variance.

Mo. 1943. Where it was impossible to say with definiteness whether claimant seeking to recover from deceased's estate was counting upon an express contract with deceased, or upon quantum meruit, claimant would be permitted to recover upon whichever of the two theories her evidence might warrant.

In re Hukreda's Estate, 172 S.W.2d 824.

Mo.App. 1913. A demand by an adult child for compensation for services rendered a deceased parent, based on an actual contract between the parties, and a demand by the child, based on the theory of a contract implied by law binding the parent, who was insane, to pay for the services, are not inconsistent.

Hartley v. Hartley's Estate, 155 S.W. 1099, 173 Mo.App. 18.

Mo.App. 1922. Administrator could not complain of variance between the demand filed in the probate court and the proof offered in support thereof, where he did not file an affidavit of surprise or complain of the variance at the hearing.

Bunton v. Newell, 239 S.W. 1096.

⇐227(7). Claims of executors and administrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐228. Presentation and filing.

⇐228(1). In general.

Mo. 1875. After the rendition of a judgment, the judgment debtor died, and the court's records were destroyed by fire. The judgment creditor filed in the probate court his petition, stating that in the lifetime of the intestate he had obtained a judgment, which had not been paid. Under an order of the court, land of the intestate was sold for the payment of debts, not including that of the judgment creditor, and, while the money arising from the sale was in the hands of the administrator, plaintiff moved that the administrator pay to him an amount sufficient to satisfy the judgment, alleging that it had been allowed in the fourth class. The judgment held by the judgment creditor was a lien on the real estate of the intestate at the time of his death. The judgment credi-

tor gave no notice to the administrator of the presentation of the claim, and there was no waiver on the part of the administrator of such notice. *Held*, that the proceeds arising from the sale could not be subjected to the lien of the judgment.

Gibson v. Vaughan, 61 Mo. 418.

Mo. 1880. Wag.St. p. 102, § 5, provides that any person may exhibit his demand against an estate of a decedent by serving on the executor or administrator a notice in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account on which the claim is founded, and that such claim shall be considered as legally exhibited from the time of such notice; and by section 7 every executor and administrator is required to keep a list of all demands so exhibited, classing them, and make returns thereof to the court at each settlement; and by section 15, when a claimant desires to establish his demand, he is required to deliver to the administrator a written notice, stating that he will present it for allowance at the next term of court. By section 17 the administrator may waive the service of the notice under section 15, but there is no such provision as to section 5. *Held*, that the report of claims by the administrator under section 7 is not evidence on which claimant can rely as to the classification of his claim, and hence, where an administrator in his annual settlement mentioned a claim as "an account presented within the first year," when as a matter of fact it had not been presented, such recital was of no value to the claimant.

Pfeiffer v. Suss, 73 Mo. 245.

Mo. 1885. Where a creditor of the estate of a decedent presents a void judgment rendered by the circuit court to the probate court for allowance and classification, and the same is allowed and classified without objection from the administrator, and the latter recognizes the validity of the claim and makes no objection thereto until the statutory period for the presentation of claims has expired, a notice given by the creditor in proceedings then taken to obtain an allowance of the claim will be considered as an amendment by way of substitution of the original indebtedness in the place of the judgment, and the claim will be treated as having been presented within the statutory time.

Wernse v. McPike, 86 Mo. 565.

Mo. 1939. The filing of a claim in probate court against decedent's estate, based on judgment obtained against decedent, was a new suit. Mo.St.Ann. § 886, p. 1168, V.A.M.S. § 516.350.

In re Jackman's Estate, 124 S.W.2d 1189, 344 Mo. 49.

Mo.App. 1899. Where an administrator de bonis non made final settlement of his trust, and an order of distribution was entered in accordance therewith, but he never filed his receipts showing compliance with said order, and was never formally discharged as administrator, he could as administrator of the plaintiff in certain judgments present said judgments to the court for classification against the estate of the judgment debtor. The sums due on such judgments never having been collected nor disbursed, the judgments themselves were unadministered assets to which he acquired title when he qualified as administrator de bonis non; and since he has never parted in any way with his title, nor has the court which invested him with it discharged him from future control as to these assets, he is still the only representative of the estate recognized by law, and is necessarily subject to the future orders of the probate court as to their distribution.

Tonnies v. McIntyre, 82 Mo.App. 268.

Mo.App. 1906. Under Rev.St.1899, § 186, V.A.M.S. § 464.060, providing that actions pending against any person at the time of his death shall be considered demands exhibited against his estate from the time the action shall be revived, notice that a judgment obtained against a decedent from which he took an appeal and died during the pendency thereof, will be exhibited against his estate, need not be given to the administrator.

Hensley v. Pankau's Estate, 97 S.W. 645, 121 Mo.App. 695.

Mo.App. 1928. Exhibiting of claim to executor or administrator is for purpose of classification. Rev.St.1919, § 185, V.A.M.S. § 464.030.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, which conformed to opinion 15 S.W.2d 1116.

Mo.App. 1937. Statutes relating to filing of a claim against a decedent's estate provide for two separate and distinct exhibitions of a demand to the executor or administrator, both within a year, the first for classification, of which the claimant "may" avail himself, and the second for allowance, which it is made. Mo.St.Ann. §§ 186, 187, pp. 115, 117, V.A.M.S. §§ 464.030, 464.040.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

The exhibition for allowance of a claim against a decedent's estate must be an exhibition to the executor or administrator in a judicial proceeding to have the claim allowed, either by action in the circuit court

in the ordinary mode, or by presentation of the claim to the probate court in which the estate is pending. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

It is essential to probate court's jurisdiction to entertain a claim that claimant shall not only give the required notice to the executor or administrator, but that he shall present his demand merely shares ratably with other the notification at least within the year, whereupon it becomes a part of the records of such court and is presented to the court in the sense of the statute. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

The judicial proceeding in the probate court looking to allowance of claim against estate is initiated or commenced upon exhibition of demand for allowance in manner provided by law, followed by presentment of claim to probate court within a year. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

The exhibition of a claim for classification as provided by statute is not the commencement of a legal proceeding based upon demand, but is only exhibition of foundation of legal proceeding which is to be thereafter commenced. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Statutory exhibition of claim for classification is intended to apprise executor or administrator of claim's nature, origin, and amount, and to afford him opportunity prior to initiation of a legal proceeding upon it to investigate its merits, determine whether or not to contest it, and, if it appears meritorious, arrange to have assets of the estate available for payment. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

The jurisdiction of the probate court to entertain a claim with a view to its allowance is not defeated by the absence of any showing of an exhibition for classification. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Mo.App. 1945. Contesting any claim which administrator has reason to believe is unfounded or unjust is the particular function and duty of administrator and ordinarily he is not obligated to give notice of the presentation of such claim to persons interested in estate.

Sutter v. Cavalier, 185 S.W.2d 304.

Peculiar circumstances may exist, where in honesty and fair dealing administrator will become obligated to give notice to those immediately interested in estate of administrator's claim against estate, and where such circumstances are present failure to give such notice when it is within administrator's power to do so, may amount to a fraudulent concealment which will vitiate allowance of claim.

Sutter v. Cavalier, 185 S.W.2d 304.

⇐228(2). Persons who may present or file claims.

Mo.App. 1908. Rev.St.1899, § 195, Ann. St.1906, p. 406, V.A.M.S. § 464.250, provides that the probate court shall not allow any demand against any estate unless the claimant shall first make oath in open court, or file his affidavit with such claim, stating that his account or demand as presented is correct; and section 197, Ann.St.1906, p. 407, V.A.M.S. § 464.150, declares that a person having a demand shall give notice to the administrator of his intention to present it for allowance. *Held*, that a claim against an estate must be presented in the manner prescribed by the claimant, and that the administrator has no power or authority to himself present the claim of a third person against the estate for allowance.

Jenkins v. Morrow, 109 S.W. 1051, 131 Mo.App. 288.

⇐228(3). Sufficiency of presentation or filing.

D.C.Mo. 1948. Under Missouri statutes requiring that demands be exhibited to representative of estate within one year and providing that an action commenced against executor shall be considered as a demand legally exhibited from time of service of original process on representative, service of process is essential to commencement of action and filing of complaint is insufficient to toll limitations. Federal Rules of Civil Procedure, rule 3, 28 U.S.C.A.; Mo.R.S.A. §§ 182, 184, V.A.M.S. §§ 464.020, 464.070.

Zuckerman v. McCulley, 78 F.Supp. 380, affirmed 170 F.2d 1015.

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Mo. 1851. Under Administration Law, art. 4, §§ 1, 12, the same notice is required in presenting a judgment for allowance against the estate of a deceased person as in prosecuting other demands.

Bryan v. Mundy, 14 Mo. 458.

Mo. 1862. A suit against an administrator upon the agreement recited in a bond of his intestate is a sufficient exhibition of the plaintiff's demand to save it from the operation of the statute of limitations of three years, though the plaintiff subsequently amended his petition and sued upon the bond for the penalty.

Farrar v. Comfort, 33 Mo. 44.

Mo. 1872. An allowance of a claim against a partnership is not an exhibition of it against their individual estates.

Burton v. Rutherford, 49 Mo. 255.

Mo. 1875. Where a transcript of a judgment rendered in the circuit court is filed in the probate court for classification, no notice to the administrator is perhaps required, as, the alleged indebtedness having been adjudicated on in the lifetime of the decedent, it has ceased to occupy the attitude of a demand. This distinction between the classification of the judgment and the allowance and classification of a demand would seem to be clearly marked out by Wag.St. p. 105, §§ 26, 27.

Gibson v. Vaughan, 61 Mo. 418.

Where the record of a judgment was destroyed, and the judgment creditor comes before the court of probate jurisdiction for the allowance of his judgment as a demand against the estate of the deceased judgment creditor, it occupies the same footing as an ordinary demand, with reference to the provision requiring the giving of notice to the administrator.

Gibson v. Vaughan, 61 Mo. 418.

Mo. 1876. Where a note, executed by a decedent and constituting a claim against his estate, was twice renewed at the solicitation of the executor, being recognized by him as a meritorious demand, and not allowed only for the reason that it was not due, there was a sufficient presentation of the claim to prevent it from being barred by limitation.

North v. Walker, 2 Mo.App. 174, affirmed North v. Walker's Adm'r, 66 Mo. 453.

Mo. 1877. An irregular proceeding for the allowance of a claim against the estate of a decedent may amount to a presentation of the claim within the meaning of Wag.St. p. 102, §§ 2, 6, limiting the time for such presentation.

North v. Walker's Adm'r, 66 Mo. 453, affirming North v. Walker, 2 Mo.App. 174.

Mo. 1879. In presenting a judgment for allowance against an estate, the same notice is required as on the presentation of other demands.

Ewing v. Taylor, 70 Mo. 394.

Mo. 1880. A creditor of an estate, meeting the administrator and showing him a claim against the estate, cannot be considered to have exhibited it within the meaning of Wag.St. p. 102, § 5.

Pfeiffer v. Suss, 73 Mo. 245.

Mo. 1882. A creditor of a decedent instituted suit in the circuit court against an administrator, and obtained judgment. The judgment was presented to the probate court and classified, without notice to the administrator, and without notice having been waived by him. *Held* that, as the judgment of the circuit court was void because the court had no jurisdiction, the service of summons in that suit against the administrator could not be considered as notice to the administrator of the presentation of a demand against his intestate.

Wernse v. McPike, 76 Mo. 249.

Mo. 1883. A surety has no demand against the estate of his deceased principal until he pays the judgment, and where, within one year after granting letters, the creditor obtained judgment against the estate and the surety, it was no such exhibition of the surety's demand as to entitle him to have his claim placed in the fifth class under Gen.St. 1865, c. 123, § 1.

Burckhartt v. Helfrich's Adm'r, 77 Mo. 376.

Mo. 1883. An appearance by an administrator in a suit against him more than a year after the granting of the letters of administration did not, for the purpose of notice of the demand under the administration law, relate back to the date of the institution of the suit, which was before the expiration of the year, though such appearance waived any defect in the service of the summons for the purpose of conferring jurisdiction on the court over the person of defendant, so as to authorize a judgment against him.

Madison County Bank v. Suman's Adm'r, 79 Mo. 527.

In a suit against an administrator, the process was not served within the year, and the record in the suit failed to show that the note on which the suit was brought accompanied the process and was served; but, on the contrary, it appeared that no copy of the instrument was ever served on the administrator. *Held*, that there was no notice of the demand, within Wag.St. p. 102, § 5, authorizing any person to exhibit his demand against the

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estate of a decedent by serving on the administrator a notice "in writing" stating the amount and nature of his claim, together with a copy of the instrument on which the claim is founded.

Madison County Bank v. Suman's Adm'r, 79 Mo. 527.

Mere knowledge on the part of an administrator of a claim against the estate of his intestate, or the mere fact that he saw a copy of the petition in a suit against him to recover on the claim, is not a sufficient notice of the demand.

Madison County Bank v. Suman's Adm'r, 79 Mo. 527.

Mo. 1884. The record of a court having jurisdiction of the subject-matter of the allowance of claims against the estates of decedents recited that plaintiff by his agent filed in court proof that defendants had been notified of the presentation of the demand, and the cause was continued until a fixed term. It recited that plaintiff appeared at such term, and again presented his demand for allowance, and filed his demand and proof that defendants had been notified that plaintiff would present his demand. *Held*, that the record sufficiently showed notice to the executors of the decedent, so as to make the allowance proper.

Vosler v. Brock, 84 Mo. 574.

Mo. 1893. Rev.St. § 197, V.A.M.S. § 464.-160, requiring 10 days' notice of the presentation to the probate court of a demand against the estate to be given to the executor, does not apply to the presentation to the probate court of a judgment of a court of record for classification, since the demand is already established by the judgment.

Stephens v. Bernays, 24 S.W. 46, 119 Mo. 143.

Mo. 1909. Where a claim against an estate is exhibited to the administrator and filed in the probate court, the claim is presented within the statute requiring the presentation of claims; the word "presentation" not meaning an actual presentation to the judge and a hearing on the claim.

Keys v. Keys' Estate, 116 S.W. 537, 217 Mo. 48.

Mo. 1913. A demand against a decedent's estate, otherwise sufficient, which, after proper notice to the administrator, was lodged with the clerk of the probate court and by him filed before the statutory two years had elapsed, was sufficiently presented to the court within Rev.St.1909, § 195, V.A.M.S. § 464.040.

Rassieur v. Zimmer, 155 S.W. 24, 249 Mo. 175.

Mo. 1915. Under direct provisions of Rev.St.1909, § 193, V.A.M.S. § 464.070, institution in the circuit court of a suit against an administratrix constitutes, from the day of service of summons, an exhibition of the demand sued for.

State ex rel. Knisely v. Holtcamp, 181 S.W. 1007, 266 Mo. 347.

Mo. 1929. Exhibition of claim to executors for classification and filing thereof in probate court, without serving timely notice of demand for allowance thereof on executors, *held* barred. Rev.St.1919, §§ 182, 186, 194, 195, V.A.M.S. §§ 464.020, 464.040, 464.150, 464.160.

State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, quashing opinion Dean v. Dean, 1 S.W.2d 235, and conformed to 15 S.W.2d 1116.

Mo.App. 1881. The holder of notes secured by real estate declined to receive payment for them before maturity. It did not appear that anything was said to the administrator of the debtor at the time he was shown the notes or at any other time from which he would infer that the notes were shown to him for the purpose of exhibiting them for allowance, or that so far as the notes were concerned that the holder looked to the estate for their payment. *Held*, that it might be supposed that the creditor intended to look to the realty alone for payment, and there was no sufficient exhibition of the demand to the administrator to hold the estate liable.

Hicks v. Jamison, 10 Mo.App. 35.

Mo.App. 1888. Rev.St. § 184, provides that all demands against the estate of any decedent shall be divided into the following classes: (5) All demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters of the estate; (6) all demands thus exhibited after the end of one year, and within two years after letters granted. Section 185 provides that all demands not thus exhibited in two years shall be barred, saving in certain cases where persons are under disability, and that said two years shall begin to run from the date of the letters, where notice is to be published within 30 days, as provided in section 87, and in all other cases from the date of publication. Section 198 provides that any one desiring to establish a demand against any estate shall deliver to the executor or administrator a written notice containing a copy of the instrument or account, and stating that he will present the same for allowance at the next regular or adjourned term of court. Section 188 provides that any person may exhibit his demand against such es-

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tate by serving on the executor or administrator a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument or account, and that such claim shall be considered legally exhibited from the time of serving such notice. Section 189 provides that no claimant shall avail himself of the benefit of the preceding section, unless he shall present his demand to the court within two years from the granting of letters. *Held*, that the holder of a claim against the estate of a decedent cannot save the two-year bar of the statute by exhibiting it to the executor without presenting it to the probate court for allowance and classification before the expiration of such period.

Price v. McCause, 30 Mo.App. 627.

Mo.App. 1898. Rev.St.1889, § 183, V.A.M.S. § 464.010, classifying demands against the estates of decedents, places in the sixth class "all demands exhibited and presented to the court for allowance after the end of one year and within two years after letters granted." Section 184 declares all demands not thus exhibited and presented to the court for allowance in two years shall be barred. *Held* that, in order to avoid the two years limitation, the claimant must not only exhibit his claim to the executor or administrator, but must present the same to the probate court for allowance, and a mere notice to an administrator that a claimant would present a certain claim at the following term of the court, which was not to be convened until after the expiration of the two years, was insufficient.

Farmers' Sav. Bank of Marshall v. Burgin, 73 Mo.App. 108.

Rev.St.1889, § 183, V.A.M.S. § 464.010, classifying demands against the estates of decedents, places in the sixth class "all demands exhibited and presented to the court for allowance after the end of one year and within two years after letters granted." Section 184, § 464.020, declares all demands not thus exhibited and presented to the court for allowance in two years shall be barred. *Held*, that filing the claim with the clerk in vacation was not presenting it to the court within the meaning of the statute.

Farmers' Sav. Bank of Marshall v. Burgin, 73 Mo.App. 108.

Rev.St.1889, § 196, V.A.M.S. § 464.150, requires that a claimant against an estate must give notice to the administrator, stating definitely the term when said claim will be presented to the probate court for allowance. A claimant gave notice to an administrator that his claim would be presented at the following term of court, which was not to be convened until after the limitation of two years barring such claim had expired, and subsequently the claimant filed a demand with the clerk of the court during vacation and before the expiration of the limitation. *Held*, that he could not recover, for, if such filing could be deemed a "presentment" to the court, the notice was insufficient and invalid, for not correctly stating the time of presentment.

Farmers' Sav. Bank of Marshall v. Burgin, 73 Mo.App. 108.

Mo.App. 1900. Rev.St.1889, §§ 187, 188, V.A.M.S. §§ 464.030, 464.040, requires that a demand against a decedent be exhibited within two years. Section 190, § 464.080, provides that demands may be established by the judgment of the court of record in the ordinary course of proceedings. Section 186, § 464.070, declares that when a judgment is so obtained it shall be considered as exhibited as of the date of the service of the process. *Held*, that a demand which was put in suit and process served on the representative of the decedent within the two years' period of limitations must be considered as having been legally exhibited.

Gewe v. Hanszen, 85 Mo.App. 136.

Mo.App. 1904. Under Rev.St.1899, § 188, V.A.M.S. § 464.030, providing that any person may exhibit his demand against a decedent's estate by serving on the administrator a notice of the amount and nature of the claim, a notice stating that the claimant will present for allowance a claim founded on two receipts from the decedent, which are set out, is insufficient in not stating the amount and nature of the claim.

Corson v. Waller, 78 S.W. 656, 104 Mo. App. 621.

Mo.App. 1912. A claimant against a decedent's estate who makes out the claim, and takes it to the home of the clerk of the probate court to have it sworn to, without requesting the clerk to file it, does not thereby file the claim within the statute.

Hinshaw v. Warren's Estate, 151 S.W. 497, 167 Mo.App. 365.

Mo.App. 1922. Where plaintiff complied with Rev.St.1919, § 185, V.A.M.S. § 464.030, by filing in the probate court a statement of the amount and the nature of the claim due her, she could recover upon a quantum meruit the value of the room and board furnished to deceased without regard to the form of her pleading.

Smith v. Collins, 243 S.W. 219.

Mo.App. 1928. Exhibition of written claim to executors within year *held* sufficient. Rev.St.1919, §§ 182, 185, V.A.M.S. §§ 464.020, 464.030.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues,

14 S.W.2d 990, which conformed to 15 S.W.2d 1116.

Claim exhibited to executors and filed in probate court on last day of statutory period *held* presented within period. Rev.St.1919, §§ 185, 186, V.A.M.S. §§ 464.030, 464.040.

Mo.App. 1929. Exhibition of claim against estate to court, and bare notice of fact of claim to administrator, do not in themselves establish claim as charge against estate. Rev.St.1919, §§ 181, 182, 185, 194–196, V.A.M.S. §§ 464.010, 464.020, 464.030, 464.050, 464.060.

Van Wagner v. Slane, 14 S.W.2d 710, 223 Mo.App. 527.

Exhibition of claim to administrator and presentation of demand to court are necessary preliminaries to notice of intent to establish claim. Rev.St.1919, §§ 186, 194, 195, V.A.M.S. §§ 464.040–464.060.

Van Wagner v. Slane, 14 S.W.2d 710, 223 Mo.App. 527.

Mo.App. 1937. The statutory exhibition of a claim against a decedent's estate must be by written notice, unless executor or administrator waives such notice, by writing in case of exhibition for classification and in case of exhibition for allowance, either in writing or else by appearance of the executor or administrator in court to the merits, short of expiration of limitation period. Mo. St.Ann. §§ 186, 187, 195–197, pp. 115, 117, 128, 130, V.A.M.S. §§ 464.030, 464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Mo.App. 1942. Notice that demand against estate would be presented at regular March term of the probate court of the county of St. Louis Mo., to be held on March 2, 1940, was insufficient to comply with statute relating to notice of demand against an estate, since there was no such term of probate court in the county, and therefore the court properly sustained motion to quash the service and return of notice and struck the demand from records of the court. Mo.R.S.A. § 194, V.A.M.S. § 464.150.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

A statutory notice of desire to establish a demand against an estate, required to be delivered by claimant, is in the nature of a "summons" and may be waived by an executrix either in writing or by appearance in court on the merits. Mo.R.S.A. § 194, V.A.M.S. § 464.150.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

A claimant having a "demand against an estate" of a decedent in order to prevent his demand from being barred by one year special limitation statute must make within such year a second exhibition of his demand to the executor for allowance, which means an exhibition to the executor in a judicial proceeding to have the demand allowed, either by an action in court in the ordinary mode, or by presentation of the demand for allowance to probate court in which the estate is pending. Mo.R.S.A. §§ 186, 194, 195, V.A.M.S. §§ 464.040, 464.150, 464.160.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

If second exhibition of claimant's demand to executor of decedent's estate for allowance of the demand is made by presentation of demand to probate court, the proceeding is initiated in manner provided by statute, namely, by claimant delivering to executor ten days before beginning of term of probate court at which claimant intends to present his demand for allowance, a written notice containing copy of instrument on which demand is founded with statement that claimant will present demand for allowance at the next regular or adjourned term of the probate court, and such notice is distinct from the one prescribed by statute relating to mode of exhibiting a demand for classification. Mo.R.S.A. §§ 186, 194, 195, V.A.M.S. §§ 464.040, 464.150, 464.160.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

⇐228 (3½). Withdrawal of claims.

For cases from other jurisdictions, see other Key Number Digests.

⇐228 (4). Evidence.

Mo.App. 1929. Evidence *held* to show sufficient exhibition of claim against estate and service of notice on administrator within one year. Rev.St.1919, §§ 181, 182, 185, 186, V.A.M.S. §§ 464.010–464.040.

Van Wagner v. Slane, 14 S.W.2d 710, 223 Mo.App. 527.

⇐228 (5). Defects, objections, and waiver.

Mo. 1849. A waiver of a notice of a claim against an estate, made in open court and noted on the record, or on the claim, is such evidence of an exhibition thereof as will take it out of the statute of limitations.

Milan v. Pemberton, 12 Mo. 598.

Mo. 1860. After an administrator has put in a defense to the allowance of a demand against the estate of his intestate, and has obtained judgment in the probate court, and the cause has been appealed, it is too

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late for him to object that he did not receive a notice of the demand as provided by article 4, § 16, of the administration act.

Kincheloe v. Gorman's Adm'rs, 29 Mo. 421.

Mo. 1871. An administrator, who had a valid individual claim against the estate of his intestate, presented the same to the probate judge in due season. The court, without appointing a person to defend the claim, as required by law, passed upon and allowed the same. Four years afterwards, the error in the proceedings having been discovered, the claim was again presented, and rejected, as barred by the statute of limitations. *Held*, that although the judgment of allowance was clearly irregular, and perhaps void, yet, inasmuch as the record showed that the administrator acted in good faith, and that he brought his demand into court, he should be regarded as having exhibited his demand within the time prescribed by law, so as to prevent the bar of the statute of limitations.

Williamson v. Anthony, 47 Mo. 299.

Mo. 1885. Though the allowance of a claim against the estate of a decedent was invalid, the administrator will not be permitted to interpose the defense that the claim is barred by the statute of limitations, when it is again presented for allowance by appropriate proceedings, where he has recognized the validity of the claim and treated it as though it had been properly allowed and classified.

Wernse v. McPike, 86 Mo. 565.

Mo. 1929. Though executors, by appearing and contesting claim, waived service of summons, waiver did not relate back to avoid bar of statute. Rev.St.1919, §§ 182, 186, 194, 195, 196, V.A.M.S. §§ 464.020, 464.040–464.060.

State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, quashing opinion Dean v. Dean, 1 S.W.2d 535, and conformed to 15 S.W.2d 1116.

Mo.App. 1877. As an administrator is not permitted to waive the service on him of the written notice required by Wag.St. p. 102, §§ 1, 5, in order to place a claim against the estate in the fifth class, there can be no question of estoppel.

Spaulding v. Suss, 4 Mo.App. 541.

An administrator has no authority to waive the provisions of Wag.St. p. 102, § 5, providing that a claimant against the administrator's estate may exhibit the demand by serving on the administrator a notice in writing, stating the amount and nature of his claim.

Spaulding v. Suss, 4 Mo.App. 541.

Mo.App. 1903. The provisions of Rev. St.1899, § 197, V.A.M.S. § 464.150, requiring notice of the presentation of a claim against the estate of a deceased person, may be waived by an administrator.

Monumental Bronze Co. v. Doty, 73 S.W. 234, 78 S.W. 850, 99 Mo.App. 195.

Mo.App. 1911. Under Rev.St.1909, § 203, V.A.M.S. § 464.150, providing that one desiring to present a demand against an estate shall deliver to the administrator written notice containing a copy of the account on which it is founded, and stating that it will be presented at the next term of court, and section 205, § 464.190, permitting the administrator to appear in court, or, by writing, waive service of such notice, actual knowledge is not equivalent to legal written notice to the administrator, and, unless the waiver of notice be made in open court, the written notice of waiver must be given, in order to give jurisdiction.

Taylor v. George, 140 S.W. 611, 159 Mo.App. 160.

An administrator wrote to persons having a claim against the estate, after the account had been filed with the probate court, stating that the account "opens new fields for operations, but we will not discuss that matter now"; that they were not very far apart, but that there were some matters which claimants would have to include, and that it was the administrator's purpose to be fair to them, and stated that they would meet when the court was held and fix the matter, as there was but little difference between them; and another letter informed claimants of the day court would convene, and requested them to come down on that date, "and we will fix our business, if we can." *Held*, that the letters did not show an intention by the administrator to waive notice of the presentation of the creditors' demand against the estate.

Taylor v. George, 140 S.W. 611, 159 Mo. App. 160.

Mo.App. 1920. Administrator's appearance in court and participation in proceedings is a waiver in court, under Rev.St.1909, § 205, V.A.M.S. § 464.190, of the notice of claim required by section 203, § 464.150.

Bennett v. Rodgers, 225 S.W. 101, 205 Mo.App. 458.

Administrator, by making agreement in vacation that the cause be continued pending final settlement of claim against estate filed in vacation, did not "appear in court" and waive notice of claim required by Rev. St.1909, § 203, V.A.M.S. § 464.150, within section 205, § 464.190, providing for waiver of

such notice by administrator's appearance in court.

Bennett v. Rodgers, 225 S.W. 101, 205 Mo.App. 458.

Mo.App. 1928. Executors *held* to have waived notice of claimant's intention to present claim by appearance in court on merits. Rev.St.1919, §§ 194–196, V.A.M.S. §§ 464.150, 464.160, 464.190.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, which conformed to 15 S.W.2d 1116.

Mo.App. 1929. After proper exhibition of claim and presentation to court, notice of intent to present claim for allowance may be waived by administrator's appearance on merits. Rev.St.1919, §§ 186, 194–196, V.A.M.S. §§ 464.040, 464.150, 464.160, 464.190.

Van Wagner v. Slane, 14 S.W.2d 710, 223 Mo.App. 527.

Notice of intent to present claim against estate for allowance *held* waived by administrator's voluntary appearance on issue of sufficiency of exhibition of claim and presentation to court. Rev.St.1919, §§ 186, 194–196, V.A.M.S. §§ 464.040, 464.150, 464.160, 464.190.

Van Wagner v. Slane, 14 S.W.2d 710, 223 Mo.App. 527.

Mo.App. 1937. Where administratrix made motion to dismiss claim on ground that claimant had not exhibited his claim for classification but had only exhibited a claim for allowance, thus admitting that she had been actually served with a claim for allowance, she was not subsequently entitled to question that probate court acquired jurisdiction over her person because notice of presentment of demand for allowance was directed to "Berdina Magel, administratrix," whereas the affidavit of service of such notice recited service merely upon "the within named Berdina Magel," without designating her as administratrix. Mo.St.Ann. § 196, p. 130, V.A.M.S. § 464.160.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Mo.App. 1942. A statutory notice of desire to establish a demand against an estate, required to be delivered by claimant, is in the nature of a "summons" and may be waived by an executrix either in writing or by appearance in court on the merits. Mo. R.S.A. § 194, V.A.M.S. § 464.150.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

Where counsel for executrix at first opportunity made special appearance in probate court and moved to quash service of notice of desire to establish demand against estate, on ground that it did not comply with the statute and the only appearance the executrix made was to challenge right of the probate court to bear the demand, there was no "waiver" of right of executrix to rely on claimant's failure to comply with the statute. Mo.R.S.A. § 194, V.A.M.S. § 464.150.

Armstrong v. Ricker's Estate, 162 S.W. 2d 646.

Mo.App. 1952. In an action on a claim against a deceased's estate where nothing appeared in creditor's petition to show that notice to creditors of the estate had ever been published as required to start the time running under special statute of limitations, petition did not show on its face that action was barred by statute of limitations and was not subject to a motion to dismiss on that ground. V.A.M.S. §§ 461.010 et seq., 461.440, 464.020.

Alexander v. Wyatt's Estate, 244 S.W.2d 121.

⇐229. Effect of presentation.

Mo.App. 1899. A claimant against the estate of a decedent filed a claim, which he subsequently withdrew, and filed a claim referring to the same matter for a larger amount. The first claim was filed as the result of a compromise agreement between the claimant and the administrator of the estate, but which the administrator repudiated. *Held*, that the claimant was not estopped from presenting his second claim, demanding a larger amount than claimed in the first claim, which was withdrawn.

Bogue v. Corwine, 80 Mo.App. 616.

Mo.App. 1937. Statutory exhibition of claim for classification does not confer jurisdiction on the court over the person of the executor or administrator, such jurisdiction being acquired only by service of notice of demand and allowance or by waiver of such notice. Mo.St.Ann. §§ 195–197, pp. 128, 130, V.A.M.S. §§ 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

⇐230. Failure to present.

⇐231. —— Effect in general.

Mo. 1834. Where deceased before his death held a lien on a tract of land jointly with the one who afterwards was appointed his administrator, and had assigned his interest therein by a separate instrument, and the assignee failed to present his demand to the administrator until after the administrator had collected the full amount of the lien and paid it all out to creditors of the estate, the administrator was not liable to a suit by the assignee for his share of the amount

collected, since he was not bound to take notice of the claim of the assignee, more than of any other creditor.

Simonds v. Pettibone, 3 Mo. 330.

Mo. 1875. Under Wag.St. p. 102, all claims which are not presented against an estate for allowance within a prescribed period shall be forever barred, and, where the administrator has by publication given due notice of the grant of letters, this bar is effectual and conclusive.

Pearce v. Calhoun, 59 Mo. 271.

Mo. 1875. Where, at the time of a payment on a note, by the maker to the administrator of the deceased payee, the two-years statute of limitations as to claims against decedents' estates is in force, failure of the maker, for two years, to present his claim against the estate for the amount paid on the note as having been wrongfully collected of him will bar the claim, although the administration may have been commenced when the three-years limitation act was in operation.

Greenabaum v. Elliott, 60 Mo. 25.

Mo. 1875. An administrator sued a bank for money deposited by his testator, and certain dividends accruing after his death, on stock owned by him. The bank claimed by way of offset money paid the testator in discount of his paper. *Held*, that the bank was not barred from setting up that defense by reason of its failure to present the claim for allowance in the probate court within three years after the grant of letters.

Lay v. Mechanics' Bank, 61 Mo. 72.

Mo. 1899. By the statute full and ample provision is made for the allowance, payment, and settlement of all claims against the estate of a decedent in the probate court, and to that court all creditors must go within the time prescribed by statute, or be forever barred.

Beckman v. Richardson, 51 S.W. 689, 150 Mo. 430.

Mo. 1903. So absolute is the bar of the creditor of decedent, who fails to file his bill within the statutory limit, from participation in the assets of the estate, that even when all the creditors who have presented and established their claims in the probate court have been paid in full, and a surplus remains in the hands of the administrator for distribution to the next of kin, not only will the probate court not entertain his claim, but no other court can give him any relief.

Cowan v. Mueller, 75 S.W. 606, 176 Mo. 192.

Mo.App. 1903. Under Rev.St.1899, § 185, V.A.M.S. § 464.020, providing that all demands not exhibited in two years after the grant of letters shall be barred, and section 184, § 464.010, directing that all demands exhibited after one year and within two years shall be placed in the sixth class, if a suit is brought against an executor on a claim within two years, the claim will not be barred, though it was not exhibited to him before suit was commenced.

Woltemahr v. Doye, 76 S.W. 1053, 102 Mo.App. 133.

Mo.App. 1906. Rev.St.1899, § 185, V.A.M.S. § 464.020, provides that demands against the estate of a decedent not exhibited in 2 years from the date of the publication of the notice of issuance of letters of administration, shall be barred. A claimant obtained a judgment against a decedent, and pending an appeal therefrom the decedent died. Administration was pending more than 2 years when the administrator entered his appearance as administrator. *Held*, that the claim was barred, it being the duty of the claimant to have had his action revived within 2 years from the date of letters of administration.

Hensley v. Pankau's Estate, 97 S.W. 645, 121 Mo.App. 695.

Mo.App. 1915. Executor *held* to have burden of invoking statute and showing that claim against estate was barred by failure to present within time required by Rev.St. 1909, §§ 191, 195, as amended by Laws 1911, pp. 81–83, V.A.M.S. §§ 464.020, 464.060, 464.070.

Weber v. Jantzen, 180 S.W. 432.

Mo.App. 1931. That no claims have been filed by creditors within time provided by statute is not conclusive evidence there are no creditors with valid claims against estate. Rev.St.1919, § 182, V.A.M.S. § 464.020.

Kirk v. Metropolitan Life Ins. Co., 38 S.W.2d 519, 225 Mo.App. 756.

Mo.App. 1938. Unless claim against deceased was exhibited to administrator for allowance within one year from date of grant of letters, claim was barred. Mo.St.Ann. §§ 183, 187, pp. 111, 117, V.A.M.S. §§ 464.020, 464.040.

Curtin v. Woolley, 114 S.W.2d 191.

⇐232. —— Excuses.

D.C.Mo. 1948. Action against executrix was barred by failure to secure service on executrix within one-year period of limitation prescribed by Missouri statute, though defendant had left state to evade service and under such circumstances as to prevent personal service within statutory period. Mo.R.S.A. §§ 182, 184, V.A.M.S. §§ 464.010, 464.060.

Zuckerman v. McCulley, 78 F.Supp. 380, affirmed 170 F.2d 1015.

For references to other topics, see Descriptive-Word Index

Mo. 1875. The statute concerning administration was intended to supersede the machinery of common law relating to the same subject, and where creditors of an estate attempt to proceed otherwise than in the manner provided by statute, some very strong and satisfactory excuse should be shown for failure to present the claim in the mode therein prescribed.

Pearce v. Calhoun, 59 Mo. 271.

Mo. 1880. Where an administrator stated to one having a claim against the estate that the claimant had two years in which to exhibit his claim, which was true, but the administrator did not state in addition that, if not presented within one year, the claim would be placed in the sixth class, the claimant has no right to rely on such advice or information, and hence it did not amount to fraud, as against the claimant, who failed to present his claim within the year.

Pfeiffer v. Suss, 73 Mo. 245.

Mo.App. 1912. An administrator who long before the running of limitations agreed to waive service of notice of claim against decedent's estate was not thereby estopped from pleading limitations, where claimant delayed the presentation of his claim until limitations had run.

Hinshaw v. Warren's Estate, 151 S.W. 497, 167 Mo.App. 365.

⇐233. — Relief.

For cases from other jurisdictions, see other Key Number Digests.

⇐234. Allowance by executors or administrators.

Mo. 1858. Where there is a demand in behalf of one estate to be presented for allowance against another estate, the same person cannot act as the administrator of both estates in the matter of obtaining an allowance of the demand.

State, to Use of Miller's Adm'r, v. Bidlingmaier, 26 Mo. 483.

Mo. 1860. Where the interests of two estates in course of settlement conflict, as where there is demand in behalf of one estate to be presented for allowance against the other, the same person cannot act as the administrator of both parties in the matter of the obtaining an allowance of the demand. Should a demand be allowed under such circumstances against one of the estates, the proceeding will be regarded as a nullity.

State, to Use of Mueller's Adm'r, v. Reinhardt, 31 Mo. 95.

Mo. 1883. Under Wag.St. p. 102, §§ 1, 4, 5, relating to the establishment of claims against the estate of decedents, no claim can be allowed by the administrator.

Madison County Bank v. Suman's Adm'r, 79 Mo. 527.

Mo. 1920. Rev.St.1909, § 195, as amended by Laws 1911, p. 82, V.A.M.S. § 464.040, requiring exhibition of claims to an administrator for allowance, does not authorize allowance by the administrator, but requires exhibition to him for allowance by court proceedings either by action under section 197, § 464.080, or by presentation to the probate court under sections 198, 203, and 206, V.A.M.S. §§ 464.140, 464.150, 464.280.

Home Ins. Co. v. Wickham, 219 S.W. 961, 281 Mo. 300, setting aside Home Ins. Co. of New York v. Wickham, 196 S.W. 385.

Mo.App. 1937. Statutes providing for exhibition of claim for classification, and for presentation of claim for allowance, do not authorize the executor or administrator to either classify or allow a claim; both allowance and classification requiring judicial action by the probate court. Mo.St.Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

⇐235. Allowance by commissioners.

For cases from other jurisdictions, see other Key Number Digests.

⇐236. Approval or allowance by court.

Mo. 1852. Under Rev.Code, p. 92, art. 4, § 10, a county or probate court has no jurisdiction to hear or decide upon a set-off claimed by an administrator against a demand exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the debtor.

Thomas' Adm'r v. Dunnica, 15 Mo. 385.

Mo. 1872. Where a tenant is forcibly dispossessed before the expiration of his lease, and sues for possession in forcible entry and detainer, and defendant dies before the property is restored, and the judgment is presented for allowance before the probate court, the estate should be allowed to set off against the same all the just claims for rent.

Robinson v. Walker, 50 Mo. 19.

Mo. 1888. Under Rev.St. §§ 205, 206, enacting that "when the demand or set-off is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court"; and, "in case the parties do not

agree to rebate the demand or set-off, no execution shall issue upon any judgment until the demand or set-off upon which the judgment was rendered shall become due and payable,"—the court should, on allowing a claim against an estate founded on a note not yet due, if the parties do not agree to a rebate, classify the demand, and order that no execution shall issue until after the maturity of the note.

Cassatt v. Vogel, 8 S.W. 169, 94 Mo. 646.

Mo. 1902. The probate court has jurisdiction to allow against an estate money demands, whether legal or equitable in their nature.

Grimes v. Reynolds, 68 S.W. 588, 94 Mo.App. 576, affirmed 83 S.W. 1132, 184 Mo. 679.

A wife, having a separate estate, gave a note to her husband for money borrowed. After her death he proved the note as an ordinary demand against her estate in the probate court. *Held*, that the probate court had jurisdiction to allow the demand, and the husband was not obliged to seek relief in a court of equity.

Grimes v. Reynolds, 68 S.W. 588, 94 Mo.App. 576, affirmed 83 S.W. 1132, 184 Mo. 679.

Mo. 1903. The probate court, under Rev.St.1899, § 192, V.A.M.S. § 464.140, has jurisdiction of a demand for money due under a contract by testator to hold plaintiff harmless from damage by fire.

Wabash R. Co. v. Ordelheide, 72 S.W. 684, 172 Mo. 436.

Mo. 1913. Taxes assessed against the executor of an estate need not be allowed as other claims by the probate court.

State ex rel. Rice v. Packard, 157 S.W. 598, 250 Mo. 686.

Mo.App. 1877. When a demand against an estate is allowed, the probate court must classify it, and, if it place the claim in the fifth class, it must do so on evidence that the demand was exhibited to the administrator in the manner required by law during the first year from the granting of letters of administration, and the claimant must affirmatively show to the court that he has complied with the law.

Spaulding v. Suss, 4 Mo.App. 541.

Mo.App. 1882. Under Rev.St. §§ 205, 206, providing that, when a demand or set-off against an estate is not due at the time of trial, the court may adjust the same at the option of the parties by rebating therefrom at the rate of 6 per cent. per annum from the time of trial until due, and, in case the parties do not agree to rebate, no execution shall issue until the demand upon which the judgment was rendered shall become due, where the parties do not agree to rebate the claimant's demand, the court has no choice but to allow the demand and to order it paid when it becomes due.

Cassatt v. Vogel, 12 Mo.App. 323.

Mo.App. 1892. Claims against the estates of decedents must be presented to and allowed by the probate court while in session as such, and not to and by the judge in vacation; and a probate judge, assuming to pass on a claim in vacation, is not the probate court.

Dingle v. Pollick, 49 Mo.App. 479.

Mo.App. 1896. Under Rev.St.1889, § 92, V.A.M.S. § 462.140, providing that executors and administrators shall commence and prosecute all actions which may be maintained and are necessary in the course of the administration, and defend all such as are brought against them, and section 222, § 465.070, which provides that in all settlements of executors and administrators the court shall settle the same according to law, and allow all disbursements and appropriations made by orders of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice, and service, the probate court has jurisdiction to allow a claim for services in and about making the final settlement of an administrator.

State ex rel. O'Brien v. Walsh, 67 Mo. App. 348.

Under said sections the probate court has authority to allow the claim directly against the estate.

State ex rel. O'Brien v. Walsh, 67 Mo. App. 348.

Mo.App. 1901. The Court of Appeals has no original jurisdiction of a motion to allow a claim by an administrator for attorney's fees and printing briefs on appeal by such administrator of a decision on an objection to his final settlement, since the allowance of such a claim would in effect amount to an allowance of a claim against the estate.

Wilson v. Ruthrauff, 87 Mo.App. 226.

Mo.App. 1914. Under Rev.St.1909, §§ 194, 203–205, V.A.M.S. §§ 464.150, 464.160, 464.190, a waiver by the administrator of written notice of the presentation of a claim was not a consent to a hearing prior to the time provided by law, and did not confer jurisdiction to hear and allow it until the next regular or adjourned term after the claim was filed.

State ex rel. Harrington v. Pratt, 170 S.W. 418, 183 Mo.App. 209.

For references to other topics, see Descriptive-Word Index

Mo.App. 1918. Notwithstanding the jurisdiction over all suits, etc., against executors given probate court by Rev.St.1909, § 198, V.A.M.S. § 464.140, probate court had no jurisdiction over claim against testatrix' estate arising from fact mortgagees foreclosed deeds of trust given by testatrix on realty specifically devised to claimants, thus forcing claimants to pay such incumbrances.

Peck v. Fillingham's Estate, 202 S.W. 465, 199 Mo.App. 277.

Mo.App. 1937. It is only in the event of the allowance of a claim that the probate court becomes concerned with the question of its classification, and, when the court having allowed the claim comes to determine such classification, the notice of exhibition for classification is "evidence" by which claimant may establish his right to have his claim accorded a preferred status. Mo.St. Ann. §§ 182, 183, 186, 187, 195–197, pp. 108, 111, 115, 117, 128, 130, V.A.M.S. §§ 464.010–464.040, 464.150, 464.160, 464.190.

Schaefer v. Magel's Estate, 108 S.W.2d 608, 233 Mo.App. 778.

Mo.App. 1938. The purpose of the statutes requiring the probate court to hear and summarily determine demands against estate without the form of pleading is to make it easy for persons not learned in the law to present their demands against estates in probate court. Mo.St.Ann. §§ 198, 292, pp. 131, 184, V.A.M.S. §§ 464.280, 467.090.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

The statutes providing for presentation of demands against estates in probate court and determination thereof summarily and without form of pleading are not to be given a narrow construction or restricted application. Mo.St.Ann. §§ 198, 292, pp. 131, 184, V.A.M.S. §§ 464.280, 467.090.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Plaintiff seeking to recover for board, lodging, and care furnished to her deceased father was not required to prove that she was to be paid a specific amount merely because demand was presented in probate court in form which named that amount, where plaintiff did not allege nor prove an agreement naming a specific amount, but merely presented evidence showing that amount demanded was reasonable value of services. Mo.St.Ann. §§ 198, 292, pp. 131, 184, V.A.M.S. §§ 464.280, 467.090.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Mo.App. 1941. A demand against the estate of a deceased person may be established or allowed only under provisions of statute covering administrations and relating to allowances and classifications of demands against estates or in an action in the circuit court. Rev.St.1939, § 181 et seq., Mo.St.Ann. § 182 et seq., p. 108 et seq., V.A.M.S. § 464.010 et seq.

In re Main's Estate, 152 S.W.2d 606, 236 Mo.App. 88, transferred 146 S.W.2d 597.

Mo.App. 1941. The fact that fees to an attorney for services rendered in administration of an estate are made by law a part of expense and cost of administration, and that such charges may be allowed directly to the attorneys and judgment obtained therefor on a sufficient petition and sufficient evidence, does not and cannot dispense with the giving of notice to all parties interested in the filing of the motion or request for such allowance.

In re Waters' Estate, 153 S.W.2d 774.

An order making an allowance of fee to attorneys for services rendered an estate, entered without notice to the administrator of the estate, was void, and action of the probate court in setting aside the order on its own motion, and in ordering with the consent of the administrator, that the petition for fee be placed on the claim docket, was proper. Rev.St.1939, § 220, Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

In re Waters' Estate, 153 S.W.2d 774.

⇐237. Order or decree.

Mo. 1880. Since, under Rev.St. §§ 209, 211, it is the province of the court to allow demands against estates of decedents, and to designate the class to which they belong, and it is the duty of the clerk to enter the amounts allowed, and the class to which they belong, and to make an entry in the abstract of demands, the court may by a nunc pro tunc order correct an erroneous entry made by the clerk on a demand against the estate of a decedent, on his entry in the abstract of demands, and make the same conform to the judgment rendered by the court.

Ritchey v. Withers, 72 Mo. 556.

Mo. 1905. A probate court having, in the presence of the administrator and a claimant against the estate, made an order allowing a claim against the individual estate of the decedent, and having approved the entry for the permanent record in the presence of both parties, had no authority, after the departure of plaintiff, and without any notice to him or his attorney, to alter the judgment entry by interlining provisions to the effect that all debts of the deceased not also allowed against the estate of a partnership of which he was a member should be first paid, and that the claim

should not be payable out of the assets of the individual estate until the individual debts should have been satisfied.

Ault v. Bradley, 90 S.W. 775, 191 Mo. 709.

Mo. 1937. Judgment of either probate or circuit court, allowing demand against decedent's estate, is judgment in rem against estate.

Wahl v. Murphy, 99 S.W.2d 32.

Mo. 1947. Judgment obtained by default against insane person was void ab initio and orders of probate court allowing against deceased defendant's estate the demand based on such judgment and ordering sale of decedent's land were likewise void and neither original judgment nor orders of probate court constituted probable cause which would preclude recovery of damages for malicious prosecution based on such proceedings.

Ripley v. Bank of Skidmore, 198 S.W.2d 861, 355 Mo. 897.

Mo.App. 1890. Where the rent under a lease was payable in monthly installments, and the administrator insisted that the claim for each month's rent should be proved as a separate demand, he cannot afterwards plead former recovery, and insist that the allowance for certain months barred subsequent claims for rent which subsequently accrued.

Kavanaugh v. Shaughnessy, 41 Mo.App. 657.

Mo.App. 1892. A claimant against the estate of a decedent presented his claim to the administrator, but failed to have the same allowed during the two years following the granting of letters of administration. Shortly after the expiration of the two years, the claim was presented to the probate judge in vacation, and he proceeded to enter on the probate records an allowance of the claim, and to save the operation of the statutory period the record of allowance was dated back, so as to come within the two years. *Held*, that the allowance of the claim was a fraud against the estate.

Dingle v. Pollick, 49 Mo.App. 479.

Mo.App. 1908. Where a claim against an estate was erroneously presented to the probate court for allowance by the administrator, instead of by the claimant, accompanied by the statutory affidavit required by Rev.St.1899, § 195, Ann.St.1906, p. 406, V.A.M.S. § 464.250, a judgment of the probate court, allowing the claim and directing its payment out of the assets of the estate was void for want of jurisdiction.

Jenkins v. Morrow, 109 S.W. 1051, 131 Mo.App. 288.

Mo.App. 1909. Judgment allowing claim against estate of deceased widow is res judicata to extent of establishment of debt in proceedings to charge debt against estate of deceased husband, leaving will giving wife estate for life, with gift over on payment of her debts.

Pierce v. Pierce, 122 S.W. 1147, 139 Mo.App. 416.

Mo.App. 1929. Allowance of unadjudicated demand and classification of judgment in probate court *held* to constitute judgments of probate court.

Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

⇐238. Setting aside allowance or disallowance.

Mo. 1854. Though a petition of an interested party, alleging that an administrator fraudulently procured an allowance to the injury of the estate, makes out a case for equitable relief, the mere allegation that the administrator illegally procured allowances to be made in his favor is insufficient.

Jones v. Brinker, 20 Mo. 87.

In law, the allowances made to administrators, in their settlements, have the effect of judgments, but they may be set aside in equity on cause being shown.

Jones v. Brinker, 20 Mo. 87.

Mo. 1911. Rev.St.1909, § 220, V.A.M.S. § 464.310, authorizing proceedings within four months after the allowance of a demand against a decedent's estate for the vacation of the allowance, and the trial of the matter anew, does not oust equity of jurisdiction to set aside a judgment allowing a demand on the ground of fraud.

Walther v. Null, 134 S.W. 993, 233 Mo. 104.

Mo. 1914. An affidavit which follows Rev.St.1909, § 220, V.A.M.S. § 464.310, providing for the filing of affidavits for the vacation of judgments allowing claims against decedent's estate, is sufficient, and the probate court must hear and determine the question whether the judgment should be set aside and, on hearing, determine whether the claim should be allowed.

King v. Stotts' Estate, 162 S.W. 246, 254 Mo. 198.

The remedy for the vacation of any allowance against a decedent's estate, given by Rev.St.1909, § 220, V.A.M.S. § 464.310, is not an exclusive remedy, but the remedy in equity remains.

King v. Stotts' Estate, 162 S.W. 246, 254 Mo. 198.

For references to other topics, see Descriptive-Word Index

Rev.St.1909, § 220, V.A.M.S. § 464.310, authorizing the probate court to vacate an allowance of a demand against a decedent's estate and for trial anew or filing of an affidavit, *held* constitutional.

King v. Stotts' Estate, 162 S.W. 246, 254 Mo. 198.

Mo. 1923. Where evidence of a probate proceeding showed the appointment of an administrator, presentation of verified claim to him, waiver of notice and entry of appearance, call on claimant to testify, consent to immediate hearing, allowance of the claim, and entry of judgment, the judgment is voidable only, and may not be set aside except for fraud in a direct proceeding brought for that purpose.

Viehmann v. Viehmann, 250 S.W. 565, 298 Mo. 356.

Mo. 1923. Rev.St.1919, § 211, V.A.M.S. § 464.310, authorizing proceedings within four months after the allowance of a demand against a decedent's estate for the vacation of the allowance, and section 283, § 467.030, providing the time within which appeals from the probate court may be allowed, do not oust equity of jurisdiction to set aside a judgment allowing a demand on the ground of fraud.

Peeters v. Schultz, 254 S.W. 182, 300 Mo. 324.

A judgment of the probate court allowing certain claims against a decedent's estate will not be set aside in a direct proceeding in equity, on the grounds that the claims were fictitious, that they were barred by the statute of limitations, that they were barred by the statute of frauds, that such claim had been fully settled by decedent; these matters being purely a defense, available only in the proceeding before the probate court.

Peeters v. Schultz, 254 S.W. 182, 300 Mo. 324.

In a suit in equity to cancel a judgment of the probate court allowing a claim against a decedent's estate on the ground of fraud, evidence *held* to warrant finding that the attorney representing such claimant also represented the estate and the other heirs at the request of the administrator and with the knowledge of the other heirs, and that plaintiff had notice that such claims were to be presented and consented thereto, and that there was therefore no fraud by the attorney or administrator.

Peeters v. Schultz, 254 S.W. 182, 300 Mo. 324.

Mo. 1945. Trustee in bankruptcy for heir of estate claiming that an allowance of claim was result of collusion between claimant and administrator was entitled to file a petition and affidavit for purpose of vacating allowance of claim. Mo.R.S.A. § 211, V.A.M.S. § 464.310.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Trustee in bankruptcy for heir of estate claiming that an allowance against estate was the result of collusion between claimant and administrator had concurrent remedies by way of appeal to circuit court from allowance and petition to vacate allowance and could take his choice of such remedies. Mo. R.S.A. §§ 211, 283, 285, V.A.M.S. §§ 464.310, 467.010, 467.030.

State ex rel. Bostian v. Ridge, 188 S.W.2d 941, 354 Mo. 145.

Petition by trustee in bankruptcy for heir of estate to vacate an allowance against estate on ground of collusion between claimant and administrator, is addressed to sound discretion of probate court. Mo.R.S.A. § 211, V.A.M.S. § 464.310.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Probate court had authority to receive and file a petition by trustee in bankruptcy for heir of estate to vacate allowance of claim on ground of collusion between claimant and administrator notwithstanding an appeal by administrator was pending in circuit court but no action should be taken in probate court until such appeal is disposed of and all orders made to dispose of petition during pendency of the appeal were void. Mo.R.S.A. §§ 211, 283, V.A.M.S. §§ 464.310, 467.010.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Where an appeal had been taken from a decree of circuit court establishing interest of trustee in bankruptcy for heir of estate, the probate court had discretion to proceed at once with hearing of petition by trustee to vacate allowance of claim against estate on ground of collusion between administrator and claimant or to await final determination of such appeal. Mo.R.S.A. § 211, V.A.M.S. § 464.310.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Mo.App. 1885. Equity may set aside an allowance obtained in the probate court on the ground of fraud, and its jurisdiction is not confined to the enjoining of the party obtaining the allowance from enforcing it.

Purdy v. Gault, 19 Mo.App. 191.

An administrator, who aided in the fraudulent procurement of an allowance against the estate of his decedent, was a

proper party defendant to a suit by the heirs to have such allowance set aside.
Purdy v. Gault, 19 Mo.App. 191.

In a suit by the distributees of an estate to obtain the setting aside of a fraudulent allowance procured by the connivance of the administrator with other parties, it was sufficient for the decree to set aside the allowance, and it was not necessary for it to adjust the accounts of the parties perpetrating the fraud.
Purdy v. Gault, 19 Mo.App. 191.

Mo.App. 1885. A claim allowed by the probate court becomes a judgment of a court of record, possessed of all the inviolability of such a judgment, and the probate court, after the term at which it was rendered, has no power to set it aside, but it can only be avoided by appropriate proceedings in equity.
Wilks v. Murphy, 19 Mo.App. 221.

Mo.App. 1892. Rev.St.1889, § 213, V.A.M.S. § 464.310, providing for vacating improper allowances against the estates of decedents, does not prevent the court of equity from exercising jurisdiction in a suit brought to annul an allowance of a claim against the estate of a decedent, based on the ground that such allowance was fraudulent as against the estate.
Dingle v. Pollick, 49 Mo.App. 479.

Mo.App. 1893. A bill by the children and heirs of a decedent, alleging an allowance of a claim against the estate, and that the allowance was fraudulent, and the result of collusion between claimants and the administrator, in that the administrator failed to notify plaintiffs of the existence of the claim, and fraudulently waived the service of the required notice of its presentation, and made no defense, was not without equity, where it also appeared that there was some personal property belonging to the estate which the claimants could compel the administrator to apply to the discharge of their claim, and to prevent which plaintiffs had no remedy at law.
Ramsey v. Hicks, 53 Mo.App. 190.

A claim for the care of an old and blind woman for over 20 years was presented against her estate. The administrator waived service of notice of the presentation, and failed to notify the children and heirs at law, who resided 15 or 20 miles distant from the residence of the administrator, and the administrator made no defense to the claim, and in an action by the children and heirs at law to set aside its allowance he testified that the reason he did not do so was because he believed that the claim was meritorious. *Held*, that no cause was shown for setting aside the allowance.
Ramsey v. Hicks, 53 Mo.App. 190.

Mo.App. 1895. Rev.St.1889, § 211, V.A.M.S. § 464.170, provides that, if an executor or administrator be temporarily absent from the state, he shall make and file a written appointment of an agent to whom notice of demands against the estate may be given. Section 212, § 464.180, provides that notice to such agent shall be as effectual as if given to the executor or administrator. These sections were contained in the Revisions of 1845, 1855, 1865, and 1879. The next section in Rev.St.1845, provided that if the executor or administrator shall, within four months after any demand shall have been allowed upon notice given as prescribed by the two preceding sections, file the affidavit of himself or other credible person that the demand has been improperly allowed, the court shall vacate such allowance. Such section in Rev.St.1889, being section 213, § 464.310, omits the words, "upon notice given as prescribed in the two preceding sections." *Held*, that the power of the probate court, under section 213, to set aside such allowance, was not limited to notices given to agents but extended to the allowance of all demands against the estate.
Martin v. La Master, 63 Mo.App. 342.

Rev.St.1889, § 213, V.A.M.S. § 464.310, authorizes the probate court to vacate an allowance of a demand against an estate, on affidavit of the executor or administrator, or some credible person, stating that affiant has good reason to and does believe that such demand was improperly allowed. *Held*, that the fact that the heir who made such affidavit had disposed of his interest in the estate did not render the vacation of the allowance void, as, if such interest had been needed for payment of debts, the heir would have been liable, so that he still had an interest in the estate.
Martin v. La Master, 63 Mo.App. 342.

Mo.App. 1904. Though the judgment of a probate court allowing a claim against a decedent is as conclusive as the judgment of any other court, Rev.St.1899, § 214, V.A.M.S. § 464.310, expressly reserves to the probate court, at the instance of enumerated parties, including a creditor of the decedent, the power to vacate an order allowing a claim against the decedent, and to try the matter anew.
Mason v. Gaither's Estate, 80 S.W. 277, 106 Mo.App. 354.

Mo.App. 1905. Rev.St.1899, § 214, V.A.M.S. § 464.310, provides that if any admin-

istrator, within four months after any demand shall have been allowed, shall file in the probate court an affidavit that he has good reason to believe that such demand has been improperly allowed, etc., the court shall vacate the order of allowance, try the matter anew, and allow or reject such demand, as shall be right, etc. *Held*, that the remedy provided by such section was not exclusive, but was concurrent with that afforded by a suit in equity to vacate a judgment obtained by fraud.

Fitzpatrick v. Stevens, 89 S.W. 897, 114 Mo.App. 497.

Where the holder of a note which had been fully paid filed the same against the maker's estate, and made a false affidavit that the whole amount thereof was due over and above all offsets, as required by Rev. St.1899, § 195, V.A.M.S. § 464.200, and the court allowed the same against the estate, the administrator having no knowledge or information leading him to believe that the note had been paid, a suit in equity was thereafter maintainable by him to set aside the judgment.

Fitzpatrick v. Stevens, 89 S.W. 897, 114 Mo.App. 497.

Mo.App. 1906. Rev.St.1899, § 214, V.A.M.S. § 464.280, authorizing the court to vacate an order of allowance of a claim against a decedent on the application of an heir, etc., does not allow a party interested in the estate, who contests the allowance of a demand to move afterwards to vacate the allowance, on the ground on which he contested it; his remedy in such a case being by appeal as expressly authorized by section 278, § 467.-010.

Keele v. Weeks, 94 S.W. 775, 118 Mo. App. 262.

An heir, whose application to be heard in opposition to the allowance of a claim against the decedent is denied, may pursue the remedy provided by Rev.St.1899, § 214, V.A.M.S. § 464.280, authorizing an heir to move to vacate an order allowing a claim against the estate of the decedent.

Keele v. Weeks, 94 S.W. 775, 118 Mo. App. 262.

Rev.St.1899, § 214, V.A.M.S. § 464.280, authorizing the court to vacate an order allowing a claim against the estate of a decedent, on the heir filing a petition therefor and furnishing satisfactory evidence of the fact that the demand has been improperly allowed, does not require the mover to give such proof against the allowance as will be required to defeat it on a hearing of the merits, but only such a probable showing against the propriety of the allowance as will convince the court that the matter ought to be reheard.

Keele v. Weeks, 94 S.W. 775, 118 Mo. App. 262.

Rev.St.1899, § 214, V.A.M.S. § 464.280, authorizes the court to vacate an order allowing a claim against the estate of a decedent on the petition of an heir furnishing satisfactory evidence of the fact that the demand was improperly allowed. An heir applied for an order vacating an allowance of a claim against the decedent. The court, in entering judgment vacating the allowance, found that the administrator made a mistake in confessing judgment, and that the claim was improperly allowed. *Held*, that the findings showed that the court was satisfied that the showing made by the heir established a probability against the propriety of the allowance of the claim, sufficient to justify the court to vacate the order.

Keele v. Weeks, 94 S.W. 775, 118 Mo. App. 262.

Where a proceeding to establish a demand against the estate of a decedent was transferred to the circuit court, as authorized by Rev.St.1899, § 1760, V.A.M.S. § 481.-130, because the judge of probate was disqualified, and the circuit court allowed the claim without hearing any evidence and after refusing an heir of the deecedent leave to contest it, the heir was entitled to pursue the remedy prescribed by section 214, § 464.310, authorizing an heir to pray for an order vacating an order allowing a demand against the estate of the decedent.

Keele v. Weeks, 94 S.W. 775, 118 Mo. App. 262.

Mo.App. 1919. In equity suit to set aside for fraud a probate judgment allowing claim against an estate, where it appeared that all parties interested were present at time of allowance but had made no complaint, a showing of fraud in procuring judgment *held* insufficient.

Doud v. Lockett, 215 S.W. 769.

Mo.App. 1928. Facts *held* to exculpate administrators from lack of diligence in not discovering, within four months, allowance of claim, relative to right of action in equity to set aside allowance. Rev.St.1919, § 211, V.A.M.S. § 464.310.

Murphy v. Farmers' Bank of Conway, 11 S.W.2d 1066.

Administrator's right to have allowance of claim set aside as contrary to agreement with cashier of claimant bank *held* unaffected by ignorance of bank's attorney of agreement.

Murphy v. Farmers' Bank of Conway, 11 S.W.2d 1066.

For later cases see same Topic and Key Number in Pocket Parts

Allowance of claim against estate *held* properly set aside under facts.

Murphy v. Farmers' Bank of Conway, 11 S.W.2d 1066.

Mo.App. 1932. Evidence *held* to show that divorced wife fraudulently procured allowance of claim for alimony against deceased husband's estate which had been paid in full.

Hanne v. Watters, 47 S.W.2d 182, 226 Mo.App. 810.

Where holder of satisfied claim procures on false affidavit of claim allowance against decedent's estate, it will be set aside in equity. Rev.St.1929, §§ 193, 194, 212, V.A.M.S. §§ 464.250, 464.260, 464.310.

Hanne v. Watters, 47 S.W.2d 182, 226 Mo.App. 810.

Statutory remedy at law to annul allowance by probate court of claim against decedent's estate is not exclusive. Rev.St.1929, § 212, V.A.M.S. § 464.310.

Hanne v. Watters, 47 S.W.2d 182, 226 Mo.App. 810.

Mo.App. 1934. Motion to set aside probate court's judgment allowing claim for burial expenses, made within nine months after judgment was rendered, was timely, since proceeding constituted direct attack upon judgment, which could be attacked at any time within three years, especially where irregularities were patent of record. Mo.St. Ann. § 1101, p. 1396, V.A.M.S. § 511.250.

In re Graves' Estate, 73 S.W.2d 844.

Allegations in motion to set aside judgment allowing $825 claim for burial expenses, that administrator was appointed within four days after death contrary to statute, that administrator certified to correctness and court allowed claim without proof, and that such acts constituted a fraud upon distributees and creditors, *held* to charge fraud and irregularity of judgment. Mo.St.Ann. § 198, p. 131, V.A.M.S. § 464.280.

In re Graves' Estate, 73 S.W.2d 844.

Where glaring irregularities appeared upon face of record in appointment of administrator, his waiver of proof of claim for burial expenses, and probate court's judgment allowing claim, judgment *held* fraud upon creditors, requiring it to be set aside. Mo.St.Ann. §§ 7–9, 186, 195, 196, 198, pp. 9, 11, 12, 115, 128, 130, 131, V.A.M.S. §§ 461.030–461.050, 464.030, 464.150, 464.160, 464.280.

In re Graves' Estate, 73 S.W.2d 844.

Mo.App. 1938. Where court ordered that demand filed by an administratrix against a deceased's estate, purportedly in plaintiff's behalf, should be allowed and placed in demands of fifth class, but allowance was void for want of jurisdiction because plaintiff had not filed an affidavit or made oath in open court in verification of demand as required by statute, plaintiff's remedy to have order set aside, that plaintiff might proceed in another suit to collect the claim, was by direct proceeding for that purpose, since order was regular on its face. Mo.St.Ann. § 193, p. 127, V.A.M.S. § 464.250.

St. Louis Fire & Marine Ins. Co. v. Wagoner, 119 S.W.2d 1007.

Where demand filed by administratrix against estate of deceased agent of insurance company for money collected for, but unpaid to, company, was allowed by court and ordered placed in demands of fifth class without company's taking any part in presentment of demand, and without company's filing affidavit or making oath in open court in verification of demand as required by statute, and company filed suit to have trust impressed upon certain funds of estate to recover claim in full, and immediately after administrator of unadministrated goods of estate, four years after the institution of the suit, filed an amended answer setting up plea of res judicata, company instituted second suit to have void allowance of court set aside, second suit was not barred by laches. Mo.St.Ann. § 193, p. 127, V.A.M.S. § 464.250.

St. Louis Fire & Marine Ins. Co. v. Wagoner, 119 S.W.2d 1007.

Mo.App. 1945. Petition alleging that administratrix fraudulently withheld addresses of plaintiff and other heirs from records of probate court and fraudulently failed to notify plaintiff of presentation by administratrix of allegedly unfounded demands against estate pursuant to deliberate scheme to prevent opposition to allowance of demands and induce court and administrator ad litem to believe demands were meritorious stated a cause of action for vacation of allowance of demands.

Sutter v. Cavalier, 185 S.W.2d 304.

Evidence was not sufficiently clear and convincing to justify vacating an allowance of administratrix' claims against deceased brother's estate for services rendered in keeping house for and nursing deceased, which were supported by testimony of disinterested witnesses, on ground that administratrix fraudulently withheld from records of probate court addresses of other heirs, fraudulently failed to notify another brother of presentation of claims, and deceived administrator ad litem and court. Mo.R.S.A. § 15, V.A.M.S. § 461.230.

Sutter v. Cavalier, 185 S.W.2d 304.

Mo.App. 1947. Equity has jurisdiction to set aside, on the ground of fraud in its procurement, the allowance of a claim against

the estate of a deceased, and a plea of adequate remedy at law will not defeat such jurisdiction.

Kamp v. Hughes, 198 S.W.2d 382.

A petition to set aside the allowance of a funeral claim, on the ground of fraud in its procurement, was insufficient where it merely alleged that the estate had a meritorious defense to the claim because it was not a legal charge upon the estate, but failed to allege the facts showing the illegality of the claim, particularly where the petition also alleged that claimant did in fact bury the deceased.

Kamp v. Hughes, 198 S.W.2d 382.

Mo.App. 1950. In suit to set aside order allowing a claim based on note, made by probate court in favor of defendant against estate of plaintiff's deceased father, allegations that defendant falsely and fraudulently, and with intent to deceive and defraud the probate court and the estate of deceased, represented certain things, sufficiently pleaded scienter.

Casserly v. Schofield, 233 S.W.2d 790.

In suit to set aside order allowing claim on note, made by probate court in favor of defendant against estate of plaintiff's deceased father, petition was not objectionable as not charging fraud in procurement of judgment in probate court. Mo.R.S.A. § 192, V.A.M.S. § 464.250.

Casserly v. Schofield, 233 S.W.2d 790.

In action to set aside order allowing claim on note, made by probate court in favor of defendant against estate of plaintiff's deceased father, evidence justified finding that signature of deceased on note involved was a forgery and that probate court was misled by fraudulent affidavit filed by defendant. Mo.R.S.A. § 192, V.A.M.S. § 464.-250.

Casserly v. Schofield, 233 S.W.2d 790.

A plaintiff who claimed that order of probate court allowing a claim on note made against estate of plaintiff's decedent was obtained by a forgery of note, and that probate court was misled by fraudulent affidavit filed by defendant in probate court, could maintain suit to set aside order and was not required to appeal. Mo.R.S.A. § 192, V.A.M.S. § 464.250.

Casserly v. Schofield, 233 S.W.2d 790.

⇐239. Review.

Mo. 1887. An objection that the affidavit filed with a claim against a decedent's estate did not state, as required by statute, that claimant "has given credit to the estate for all payments and offsets to which it is entitled," cannot be first raised on appeal.

Chidsey v. Powell, 4 S.W. 446, 91 Mo. 622, 60 Am.Rep. 267.

Mo. 1914. Where the probate court vacated, on the petition of heirs, a default judgment allowing a claim against a decedent's estate, and then, after hearing, rendered judgment for claimant in a less sum, and the claimant appealed to the circuit court, complaining of the vacation of the allowance and the judgment for an inadequate sum, the court acquired jurisdiction of the whole controversy.

King v. Stotts' Estate, 162 S.W. 246, 254 Mo. 198.

Where a claimant against a decedent's estate declined to make proof in the circuit court of his claim, the court must dismiss the case.

King v. Stotts' Estate, 162 S.W. 246, 254 Mo. 198.

Mo. 1938. On appeal from judgment disallowing claim against a testatrix' estate based on provision of will, reviewing court was not required to consider competency of extrinsic evidence introduced by appellant.

Rowe v. Strother, 111 S.W.2d 93, 341 Mo. 1149.

Mo. 1945. Trustee in bankruptcy for heir of estate claiming that an allowance against estate was the result of collusion between claimant and administrator had concurrent remedies by way of appeal to circuit court from allowance and petition to vacate allowance and could take his choice of such remedies. Mo.R.S.A. §§ 211, 283, 285, V.A.M.S. §§ 464.310, 467.010, 467.030.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Mo.App. 1903. Though the appellate court, on appeal in a suit to set aside on the ground of fraud allowances of claims against an estate, may determine the case for itself, yet, the evidence being largely from the mouths and conduct of witnesses, it is privileged to be largely influenced by the finding of the trial judge.

Crawford v. Dixon, 71 S.W. 470, 97 Mo. App. 558.

Mo.App. 1911. Rev.St.1909, § 1924, V.A.M.S. § 507.100, providing that when an interest is transferred in any pending action, etc., the action shall be continued in the name of the original party, if the party to whom the transfer is made will indemnify the party in whose name the suit is to be continued against all costs and damages that may be occasioned thereby, etc., applies to proceedings in the probate court, and hence where,

after a partnership had filed a claim against an estate, the firm assets were in the course of bankruptcy proceedings transferred to a third party, and no move was made to substitute the latter as claimant, the partnership was entitled to appeal from an order substituting the public administrator as claimant, and in effect precluding the partnership from recovering on the claim.

E. R. Hawkins & Co. v. Quinette, 136 S.W. 246, 156 Mo.App. 153.

Mo.App. 1920. In a proceeding against an estate on a claim for labor performed for deceased, where the petition asserts that work was performed between certain dates as a specific rate and the verdict and judgment are for an amount at such rate for greater number of weeks than are included in such time, it is excessive to such an extent and must be reversed.

Rouden v. Heisler's Estate, 219 S.W. 691.

Mo.App. 1926. Allowance of attorney's fees governed by statute not providing for rehearing.

State ex rel. Zeppenfeld v. Calhoun, 279 S.W. 188.

Appeal from order allowing attorney's fees *held* properly taken, notwithstanding pendency of motion for rehearing.

State ex rel. Zeppenfeld v. Calhoun, 279 S.W. 188.

Mo.App. 1927. Probate court's striking amended claim against incompetent's estate from files, refusing new trial, and adjudging plaintiff take nothing, *held* appealable judgment.

Barnes v. Baker, 299 S.W. 80.

On appeal from dismissal of claim against estate in probate court, circuit court tries case de novo without regard to previous error.

Barnes v. Baker, 299 S.W. 80.

Mo.App. 1930. Claimant appealing from probate court's judgment disallowing claim, not stating consideration for agreement to pay another's note, could amend statement on appeal so as to allege real consideration. Rev.St.1919, §§ 185, 197, 289, V.A.M.S. §§ 464.080, 464.090, 467.280.

Stanton v. Edman, 28 S.W.2d 425.

Mo.App. 1938. The purpose of the statutes requiring the probate court to hear and summarily determine demands against estate without the form of pleading and relating to trial de novo in circuit court on appeal is to make it easy for persons not learned in the law to present their demands against estates in probate court and have them determined there and on appeal in circuit court without being held to technical formalities and rules. Mo.St.Ann. §§ 198, 292, pp. 131, 184, V.A.M.S. §§ 464.280, 467.090.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

The statutes providing for presentation of demands against estates in probate court and determination thereof summarily and without form of pleading and for trial de novo in circuit court are not to be given a narrow construction or restricted application. Mo.St.Ann. §§ 198, 292, pp. 131, 184, V.A.M.S. §§ 464.280, 467.090.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

In proceeding on claim by decedent's daughter against his estate for board, lodging, and services, evidence was sufficient to take to jury issue whether there was mutual understanding that claimant should be compensated.

Liebaart v. Hoehle's Estate, 111 S.W.2d 925.

Mo.App. 1938. In action originating in probate court plaintiff's petition, claiming the total amount of an estate on ground that decedent had agreed to pay plaintiff as compensation for services rendered the entire amount of his estate at his death, set up a cause of action based on an express contract, breach of which was not actionable at law, and plaintiff could not recover on theory of quantum meruit.

Whitworth v. Monahan's Estate, 111 S.W.2d 931, transferred 100 S.W.2d 460, 339 Mo. 1123.

Mo.App. 1941. In proceedings against executor to recover for board, nursing and care furnished deceased the trial judge and jury were exclusive judges of weight of evidence.

Witte v. Smith, 152 S.W.2d 661, 237 Mo. App. 639.

⇐240. Costs.

For cases from other jurisdictions, see other Key Number Digests.

⇐241. Effect of allowance or disallowance.

Mo. 1840. Under Rev.Code 1835, p. 56, §§ 8, 9, 13, 20, and page 156, § 15, relating to the jurisdiction of the county court, a decision of the county court disallowing a claim against the estate of a decedent is a judgment.

McKinney's Adm'r v. Davis, 6 Mo. 501.

Mo. 1852. The allowance of a claim against a deceased persons' estate is a judg-

For references to other topics, see Descriptive-Word Index

ment, and will be respected as such; but quære, is it a lien on the estate?

Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219.

Mo. 1884. The allowance of a claim in the probate court cannot be attacked in a collateral proceeding.

St. Francis Mill Co. v. Sugg, 83 Mo. 476.

Mo. 1884. The allowance of a claim against the estate of a decedent by the court rebuts the prima facie appearance that the claim was not presented within the statutory period.

Vosler v. Brock, 84 Mo. 574.

Where, in proceedings for an order for the sale of real estate of a decedent for the payment of a claim, the record shows that the claim was regularly allowed, the order of sale must follow, on it being shown that there is no personal property out of which the claim can be satisfied, and parol evidence tending to show that the claim should never have been allowed cannot stay the order for the sale.

Vosler v. Brock, 84 Mo. 574.

Mo. 1884. Under Rev.St.1879, § 192, the allowance of a demand against the estate of the debtor and the record of such allowance has the force and effect of a judgment.

Julian v. Calkins, 85 Mo. 202.

Mo. 1891. A nunc pro tunc order of the probate court entered six years after the original order, and correcting an allowance to a creditor, cannot be attacked in a collateral proceeding.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Mo. 1896. Under Rev.St.1889, §§ 213, 285, V.A.M.S. §§ 464.310, 467.010, relating to the establishment of claims against the estate of decedents, a judgment of allowance of a claim by a probate court possesses the same conclusive force as the judgment of other tribunals.

Moody v. Peyton, 36 S.W. 621, 135 Mo. 482, 58 Am.St.Rep. 604.

A judgment of allowance of a claim against the estate of a decedent is in all its essentials and consequences a judgment in rem, which, like other judgments in rem, in similar circumstances, is binding on the whole world.

Moody v. Peyton, 36 S.W. 621, 135 Mo. 482, 58 Am.St.Rep. 604.

Mo. 1898. An allowance of a claim against an estate in the manner required by the statute is a judgment having the conclusiveness of a judgment of a court of general jurisdiction, and is not subject to collateral attack.

Clark v. Bettelheim, 46 S.W. 135, 144 Mo. 258.

Mo. 1903. The allowance by the probate court of a note against intestate's estate has the effect of a judgment, which cannot be collaterally attacked by evidence that the note had no consideration, in a suit to set aside as fraudulent a conveyance by intestate, and to subject the property to payment of the allowance.

Clark v. Thias, 73 S.W. 616, 173 Mo. 628.

Mo. 1911. A judgment of the probate court allowing a demand against a decedent's estate is conclusive except as against a direct attack by bill in equity or by a proceeding under Rev.St.1909, § 220, V.A.M.S. § 464.310, authorizing a proceeding for the vacation of improper allowances against decedents' estates.

Walther v. Null, 134 S.W. 993, 233 Mo. 104.

Mo. 1915. Under Rev.St.1909, §§ 98, 190, 191, V.A.M.S. §§ 461.760, 464.010, 464.020, orders of probate court, allowing claims of firm creditors and a claim of a deceased partner's estate against the firm, and making all the claims of the same class, *held* not to prevent the firm creditors from having their claims paid first out of firm assets.

White Cloud Milling & Elevator Co. v. Thomson, 175 S.W. 897, 264 Mo. 595, transferred from Court of Appeals In re D. D. Perkins & Co.'s Estate, 148 S.W. 969, 166 Mo.App. 170.

Mo. 1927. Allowance of children's claim against father's estate, evidenced by notes, *held* to establish such children as creditors, barring claim that notes were without consideration. Rev.St.1919, §§ 189, 191, V.A.M.S. §§ 464.140, 464.240.

Croft v. Morehead, 293 S.W. 405, 316 Mo. 1213.

Mo.App. 1876. An allowance against the estate of a decedent has the force of a judgment against the estate, which, unless reversed by the circuit court on appeal, is not subject to change.

State, to Use of Mudd, v. Shaw, 1 Mo. App. 511.

Mo.App. 1876. A probate proceeding, allowing the claim of a bank for the amount due on a draft after crediting the amount decedent held on deposit, is res judicata of an action by the administrator to recover the deposit.

Knecht v. United States Sav. Institution, 2 Mo.App. 563.

Mo.App. 1886. The probate courts, in the allowance and classification of demands against an estate, are upon the same footing with courts of general jurisdiction, and their judgments possess the same efficacy and solemnity, and the same presumptions attach to them as to circuit courts.

Cooper v. Duncan, 20 Mo.App. 355.

Mo.App. 1903. Under Rev.St.1899, §§ 1580, 192, 3713, V.A.M.S. §§ 464.140, 476.010, 511.350, providing that probate courts are courts of record, that an allowance of a claim by a court of record against an estate is a judgment, and that a judgment of a court of record is a lien on the real estate of the debtor, a person whose claim against an estate has been allowed by a probate court is a judgment creditor of the estate.

Funk v. Seehorn, 74 S.W. 445, 99 Mo. App. 587.

Mo.App. 1906. The allowance of a demand against the estate of a deceased person, unappealed from, constitutes in general a final judgment which is conclusive of the validity of the claim on final settlement of the administrator's accounts.

Ivie v. Ewing, 96 S.W. 481, 120 Mo.App. 124.

Mo.App. 1909. A judgment allowing a claim against the estate of a deceased widow is res judicata to the extent of the establishment of the debt in proceedings to charge the debt against the estate of the deceased husband, leaving a will giving his wife the use of his estate for life, with gift over after her death on the payment of her debts.

Pierce v. Pierce, 122 S.W. 1147, 139 Mo. App. 416.

Mo.App. 1929. Claim against deceased's estate for nursing and care was barred by allowance of original bill for room and board, special nurse, and other incidental expenses.

Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

Executor *held* not to have waived splitting of claimant's demand against estate.

Gooldy v. Lavender, 16 S.W.2d 681, 223 Mo.App. 354.

Mo.App. 1936. It is primary duty of executor or administrator to defend against all claims brought against estate, but after claim has been heard, its merits judicially determined and judgment, not appealed from, rendered thereon, it becomes liquidated demand, and executor must treat judgment as any other valid claim and pay it off in full, if estate's assets are sufficient, after classification thereof as valid claim by probate court. Mo.St.Ann. §§ 17, 94, 185, 186, 189, 206, pp. 18, 57, 115, 121, 134, V.A.M.S. §§ 461.250, 462.140, 464.030, 464.050, 464.070, 464.100.

State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

(C) DISPUTED CLAIMS.

⇐242. Contest of claims in general.

Mo. 1952. Attorneys who filed demand against estate of a decedent for legal services rendered decedent during lifetime of decedent were entitled to only one satisfaction, but they could pursue as many consistent remedies and as many obligors as were available to them.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1879. An heir of an intestate estate cannot maintain an action in equity to set aside the allowance of a claim by the probate court, on the ground that the allowance was fraudulently procured, and that, except for such claim, it will not be necessary to sell real estate, since the remedy of the heir is to wait until an application is made for the sale of real estate, and to resist the application in the probate court.

Casey v. Murphy, 7 Mo.App. 247.

⇐243-244.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐245. Objections and exceptions to claims.

Mo. 1893. An objection that 10 days' notice of the presentation of a demand against an estate was not given the executor, as required by Rev.St. § 197, V.A.M.S. § 464.160, is waived by a general appearance of the executor in the circuit court on appeal from the probate court, and a submission to its jurisdiction by a trial on the merits.

Stephens v. Bernays, 24 S.W. 46, 119 Mo. 143.

Mo.App. 1912. To invoke the bar of limitations to a claim against a decedent's estate, it is not necessary to file a written pleading setting up limitations, either in the probate court or in the circuit court on appeal.

Hinshaw v. Warren's Estate, 151 S.W. 497, 167 Mo.App. 365.

Mo.App. 1913. By going to trial upon the merits, an administrator waived his motion to require a claimant to make his claim more definite and certain.

Sandusky v. Courtney, 153 S.W. 1084, 168 Mo.App. 325.

For references to other topics, see Descriptive-Word Index

Under the informal procedure in probate courts, no answer was required to a claim for services filed against an estate; issue having been joined on the facts by going to trial on the merits.

Sandusky v. Courtney, 153 S.W. 1084, 168 Mo.App. 325.

Mo.App. 1916. Where administrator went to trial on the merits without objection for want of notice of the filing of amended statement of claim, this objection was waived.

Coates v. Dunnivant, 182 S.W. 821.

An administrator, by going to trial on the merits, waived the objection that the original claim was not sufficient on which to base an amendment.

Coates v. Dunnivant, 182 S.W. 821.

Mo.App. 1949. In resolving a claim against an estate, probate court has jurisdiction respecting all matters necessary for determination of liability and whatever would be a good defense in an action on a claim brought in circuit court would be equally good in a proceeding to establish claim in probate court.

Evans v. York, 216 S.W.2d 124.

⇐246. Arbitration or reference.

Mo. 1910. Where claimants against the estate of a deceased partner and the firm estate, and the administrator of the estates, entered their appearances in the probate court for an adjustment of the claims and counterclaims pending in court, and agreed to a reference by authorizing the court to name an attorney to determine and adjudicate the claims, and agreed that the probate court should approve such report, each party reserving the right of appeal to be heard on the evidence and facts heard and found by the referee, the parties conferred on the probate court the power to appoint an attorney as referee to adjust the claims and counterclaims, and the parties could not thereafter object to such reference, and a judgment when entered on the report of the referee was equivalent to a judgment by confession.

In re Jarboe's Estate, 127 S.W. 26, 227 Mo. 59.

An executor or administrator may submit to arbitration claims against the estate without special authority from the probate court, though at common law he acts at his peril, and where the award on his counterclaim is less than would have been obtained by suit at law, he may be liable, but his agreement to arbitrate is nevertheless good.

In re Jarboe's Estate, 127 S.W. 26, 227 Mo. 59.

Mo.App. 1910. Where a claim against a decedent's estate was sent to a referee for trial, with directions to report his findings of fact and conclusions of law, the court, on return of the report, may set it aside, and make findings of fact and law of its own from the evidence.

Fullerton Lumber Co. v. Massard, 128 S.W. 831, 144 Mo.App. 61.

⇐247. Hearing by commissioners.

For cases from other jurisdictions, see other Key Number Digests.

⇐248. Trial by probate court.

⇐249. —— Nature and form of proceeding.

Mo.App. 1921. The claim by an administrator pendente lite against the estate of deceased person pending process of administration for the fees of attorneys claimed to have been incurred in the course of administering the estate is a proceeding at law, not in equity.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

Where an administrator pendente lite received no assets of the estate, and therefore made no settlement, a claim by him for fees of attorneys, claimed to have been incurred on administering the estate, does not involve an equitable accounting.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

⇐250. —— Jurisdiction.

Mo. 1851. Under the eighth section of the fourth article of the law concerning administration, the county court has jurisdiction of a demand against the estate of a deceased person for the value of a slave converted to his own use in his lifetime.

Moore v. Brown, 14 Mo. 165.

Mo. 1855. Under the statute providing "that the county court shall have jurisdiction to hear and determine all demands against any estate," that court has jurisdiction over a demand against an estate based on a bond executed by the decedent to secure faithful discharge of a curator's duties.

State, to Use of Smith, v. Paul's Ex'r, 21 Mo. 51.

Mo. 1895. A probate court has jurisdiction of a proceeding against a decedent's estate to enforce an antenuptial agreement between decedent and his wife, and for an accounting for trust funds held by him thereunder.

Hoffmann v. Hoffmann's Ex'r, 29 S.W. 603, 126 Mo. 486.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1910. Under Rev.1899, §§ 192–194, 204, Ann.St.1906, pp. 404, 405, 409, V.A.M.S. §§ 464.230–464.250, 464.300, conferring on the probate court jurisdiction to determine demands against decedents' estates, and adjust set-offs, probate courts has jurisdiction to hear claims against a decedent's estate and incidentally to hear all counterclaims in favor of the estate where filed, as against a claim theretofore filed.

In re Jarboe's Estate, 127 S.W. 26, 227 Mo. 59.

Where claimants against the estates of a deceased partner and of the firm, and the administrator of the estates, who filed counterclaims, waived formal notice, and by writing entered their appearance in the probate court for the adjustment of the claims and counterclaims, the probate court acquired jurisdiction of the parties.

In re Jarboe's Estate, 127 S.W. 26, 227 Mo. 59.

Mo. 1952. If demand against estate of decedent filed in probate court is wholly insufficient, probate court acquires no jurisdiction to hear and determine claim and circuit court will acquire none on appeal.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1881. The vendor of land, who gave a bond for a deed and took notes for the purchase price, might collect the interest due at the death of the vendee in the probate court, irrespective of the insolvency of the vendee and the impossibility of carrying out the contract.

Castilo v. Martin, 11 Mo.App. 251.

Mo.App. 1887. Probate courts have no chancery jurisdiction, and cannot entertain claims on purely equitable demands, such as a claim to subrogation by the administrator, who has paid debts of the estate out of his private means; such claims being enforceable only in the circuit court.

Roberts v. Bartlett, 26 Mo.App. 611.

Mo.App. 1894. In condemnation proceedings the improvements on the land were owned by the tenant, and it was agreed that they should be transferred to the owner, and that the assessment of damages should be made in his name, and he would pay the amount of the damages to the improvements to the tenant. *Held*, that the probate court had jurisdiction of a proceeding to recover such damages from the estate of the landlord; it being a proceeding in the nature of money had and received, and not an equitable proceeding.

Mt. Olive & St. L. Coal Co. v. Slevin's Estate, 56 Mo.App. 107.

Mo.App. 1895. Testator by his will gave his wife a life estate in his property, with remainder to his living children, and at his death the wife took the entire personal property and controlled the same until her death, many years after, buying some real estate and giving from time to time property to her children. When testator died, the widow was entitled, under Rev.St. 1845, c. 54, § 2, to one-third of the husband's personalty absolutely, subject to the husband's debts, and under chapter 3, art. 2, § 30, to personalty of the value of $200, free from the husband's debts. Plaintiffs, living children of testator, filed a claim against the wife's estate for the full amount of the personalty which she received. *Held*, that as she was in no event chargeable with the whole amount of the personalty, and the suit being to follow a trust fund through many transformations during a long series of years, the probate court had no jurisdiction; nor could the equities be worked out in a proceeding against the administrator alone, but the children of deceased children, who were distributees of the wife's estate, must be brought in, and hence a judgment for the administrator was proper.

Wombles v. Young, 62 Mo.App. 115.

Mo.App. 1895. Under Rev.St.1889, § 191 et seq., V.A.M.S. § 464.140 et seq., the probate court has jurisdiction to adjust accounts where the demand in favor of the estate and against the claimant is greater than that of the claimant against the estate.

Mitchell v. Martin, 63 Mo.App. 560.

Mo.App. 1896. Under Rev.St.1889, § 191, V.A.M.S. § 464.140, which provides that probate courts shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate, etc., a probate court has jurisdiction of a suit against the estate of a deceased trustee by his successor in the trust to have a balance of the trust fund alleged to be due from deceased at the time of his death allowed as a demand against the estate.

Maginn v. Green, 67 Mo.App. 616.

Mo.App. 1901. Where a breach of contract by decedent occurred in his lifetime, and the amount of the damages thereby occasioned was evidenced by two judgments, the demands thus created were cognizable either in the circuit or the probate court. Rev.St.1899, §§ 191, 192, V.A.M.S. §§ 464.080, 464.140.

Wabash R. Co. v. Ordelheide, 88 Mo. App. 589.

Mo.App. 1902. A defense of set-off to a claim against an estate in the probate court,

of purely equitable cognizance, could not be litigated in the proceeding on the claim in such court; nor could the judgment in the proceeding be stayed till it could be litigated elsewhere, there being no claim that the claimants were insolvent.

Holliday v. Nolan, 67 S.W. 663, 93 Mo. App. 403.

Mo.App. 1904. Probate courts have no jurisdiction of an action against an executor for legal services rendered him before an allowance of a claim against the estate therefor, under Rev.St.1899, § 223, V.A.M.S. § 465.100, granting such courts jurisdiction only to adjudicate matters on settlements made with executors and administrators.

Stephens v. Cassity, 77 S.W. 1089, 104 Mo.App. 210.

Mo.App. 1913. Under Rev.St.1909, §§ 198, 199, 200, V.A.M.S. §§ 464.140, 464.240, 464.300, the probate court has jurisdiction to entertain a counterclaim interposed by an administrator in all cases where counterclaims are otherwise authorized by law.

Nelson v. Troll, 156 S.W. 16, 173 Mo. App. 51.

Mo.App. 1949. Where claim of attorney for services rendered to decedent was based solely upon power of attorney executed by decedent which was defended on ground of mental incapacity at time power of attorney was executed, the probate court had full jurisdiction to determine the validity of the power of attorney and no formal pleading was required to raise such issue.

Evans v. York, 216 S.W.2d 124.

In resolving a claim against an estate, probate court has jurisdiction respecting all matters necessary for determination of liability and whatever would be a good defense in an action on a claim brought in circuit court would be equally good in a proceeding to establish claim in probate court.

Evans v. York, 216 S.W.2d 124.

⇐251. —— Proceedings.

Mo. 1839. On an application by a creditor to the county court for the allowance, against the estate of a decedent, of a claim evidenced by a note which had been given in payment for a chattel sold on a warranty indorsed on such note, the administrator was entitled to avail himself of a breach of such warranty as an equitable defense to such demand.

Wilcox v. Powers, 6 Mo. 145.

Mo. 1857. Under a notice of the presentation of a demand against an estate at the next term of the county court on the first day, it may be taken up the second day.

Phillips v. Russell's Adm'r, 24 Mo. 527.

Mo. 1866. Since county courts, under Rev.Code 1855, p. 155, § 18, are authorized to hear and determine demands in a summary way, without the form of pleading, the strict legal rules of pleading do not apply thereto, and a complaint filed in such court, charging an estate with a judgment rendered in favor of the plaintiff, was sufficient, though such judgment was shown by the evidence to have been rendered in favor of the plaintiff and another, who, prior to the filing of the complaint, had assigned his interest therein to such plaintiff.

Sublett v. Nelson, 38 Mo. 487.

Mo. 1946. Demands against the estates of decedents are required to be exhibited and the demand thus exhibited determines the controverted issue in question. Mo.R.S.A. § 197, V.A.M.S. § 464.280.

In re Thomasson's Estate, 196 S.W.2d 155, 355 Mo. 274, 170 A.L.R. 1170.

Except for the demand which evidences the claim against the estate all pleadings setting up consistent defenses to the demand may be oral in the probate court and in the circuit court on appeal. Mo.R.S.A. §§ 197, 291, V.A.M.S. §§ 464.280, 467.090.

In re Thomasson's Estate, 196 S.W.2d 155, 355 Mo. 274, 170 A.L.R. 1170.

Set-offs and counterclaims constitute cross-demands which may be reduced to judgment and should not be used to defeat a demand against decedent's estate unless the record discloses such fact. Mo.R.S.A. §§ 197, 291, V.A.M.S. §§ 464.280, 467.090.

In re Thomasson's Estate, 196 S.W.2d 155, 355 Mo. 274, 170 A.L.R. 1170.

Mo. 1952. In enacting statute providing that probate court shall hear and determine demands in a summary manner without form of pleading, and shall take evidence of competent witnesses or other legal evidence, and in enacting statute providing that, in case of appeal, court having appellate jurisdiction shall be possessed of cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in proceedings of probate court, Legislature intended to make it easy for persons not learned in law to present demands against estates in probate court and on appeal in circuit court without being held to technical formalities and rules. V.A.M.S. §§ 464.280, 467.090.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1890. Rev.St.1879, § 205, provides that, when a demand is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court, or, at the

option of the parties, by rebating therefrom at the rate of 6 per cent. per annum from the time of trial until due. Section 206 provides that, in case the parties do not agree to rebate, no execution shall issue upon any such judgment until the demand upon which the judgment was rendered shall become due and payable. *Held*, that the word "demand" includes rent unearned.

Kavanaugh v. Shaughnessy, 41 Mo.App. 657.

Mo.App. 1896. Where a claim against an estate is duly exhibited to the administrator, who waives service of notice thereof and agrees that it shall be heard at the next term of the probate court, and by consent the hearing is continued from term to term, although no orders of continuance are entered on the docket of the probate court, the claim was filed in time and remains pending; there being no order finally disposing of it.

Nicholls-Shepard Co. v. Donavon, 67 Mo.App. 286.

Mo.App. 1908. Where a claim against decedent's estate for funeral expenses was not challenged in the statement of defenses by defendant's counsel as extravagant considering decedent's wealth and position in life, evidence that the interment was extravagant was not within the issues.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

Where there was no issue on a claim against decedent's estate for funeral services that the funeral provided was extravagant, evidence that the widow, when she gave the order, stated that her deceased husband was in the habit of buying the best, and as to the kind of funeral she wished for him, and the inventory showing that he left a large estate, was irrelevant.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

Mo.App. 1916. In an application in probate court for the allowance of a running account, formal pleadings are unnecessary to raise the objection that plaintiff is attempting to split his demand, having already recovered a portion of the same account.

Peper Automobile Co. v. St. Louis Union Trust Co., 187 S.W. 109.

Mo.App. 1917. As against a claim in probate court, an executor need not plead the statute limiting time in which to present claims, Rev.St.1909, § 191, V.A.M.S. § 464.020, as amended March 13, 1911 (Laws 1911, p. 81); it being sufficient to raise the point in such a way as to make it clear to court and counsel that the executor is relying upon the statute.

C. H. Albers Commission Co. v. Vogelsang, 190 S.W. 1058, 196 Mo.App. 180.

Mo.App. 1917. An administrator ad litem defending disputed claim has the same authority to stipulate as to fees advanced in defending estate against claim which he was appointed to defend, that an executor or administrator would have in defending against claim by any person other than executor or administrator.

In re McManus' Estate, 199 S.W. 422.

Mo.App. 1944. In a proceeding against decedent's estate, a petition based on an alleged contract and annexed to the demand for services as a farmhand was mere surplusage, and it was not error to permit plaintiff to withdraw the petition and introduce evidence on the theory of quantum meruit. Mo.R.S.A. §§ 192, 197, V.A.M.S. §§ 464.250, 464.280.

Savage v. Michalon's Estate, 176 S.W. 2d 626.

Mo.App. 1948. In probate proceeding, where claimant based her right to recover for services from estate upon an express contract with deceased, recovery could not be had upon quantum meruit when evidence failed to establish the contract.

Brown v. Clark's Estate, 207 S.W.2d 530.

Mo.App. 1948. Despite liberality of pleading in probate court where a claim for services originated, claimant having elected to plead a contract for services rendered for decedent with particularity was bound by it and could not recover under a different contract.

Farris v. Faris' Estate, 212 S.W.2d 71.

In proceeding by nephew to recover reasonable value of services rendered to deceased aunt, where claimant pleaded that services were rendered under a verbal agreement and understanding between him and deceased whereby he would render services and deceased would pay him therefor after her death by provision in her will, an express contract was effectively pleaded requiring claimant to establish it and recover thereunder, if at all.

Farris v. Faris' Estate, 212 S.W.2d 71.

Mo.App. 1949. Where claim of attorney for services rendered to decedent was based solely upon power of attorney executed by decedent which was defended on ground of mental incapacity at time power of attorney was executed, the probate court had full jurisdiction to determine the validi-

ty of the power of attorney and no formal pleading was required to raise such issue.
Evans v. York, 216 S.W.2d 124.

⇐252. —— Evidence.

Mo. 1883. In a suit for the allowance of a claim against the estate of a decedent, instituted by an adopted child of the decedent to recover for services rendered as housekeeper and nurse, evidence examined, and *held* not to establish any contract, express or implied, whereby the claimant was to be paid for such services.
Cowell v. Roberts' Ex'r, 79 Mo. 218.

Mo. 1885. In a proceeding for the allowance against an estate of a decedent for various items of money of a ward advanced or loaned to the decedent, the inventory of the decedent's estate and the settlement of the curator of the ward are properly excluded, where they neither prove nor tended to prove or disprove any issue in the case.
Coombs v. Coombs, 86 Mo. 176.

In a proceeding by a curator for the allowance of an account against the estate of a decedent for money of the ward advanced or loaned to the decedent, a statement in the handwriting of the curator is admissible against him, where it tended to show an indebtedness to the decedent at that time.
Coombs v. Coombs, 86 Mo. 176.

Mo. 1885. That one filing a claim for services against the estate of a decedent did not keep an account of the same, or demand payment from decedent during more than 2½ years, while the services were being performed, affords some evidence adverse to the claim.
Watkins v. Donnelly, 88 Mo. 322.

Mo.App. 1911. Evidence, in a proceeding on an account against an estate, *held* to show that the administrator did not intend to waive notice of the presentation of the demand against the estate.
Taylor v. George, 140 S.W. 611, 159 Mo. App. 160.

Mo.App. 1914. Burden of showing that decedent, against whom judgment was entered after his death, was dead before the court acquired jurisdiction by the filing of a bond on appeal from the justice court *held* to be on his executrix.
Gunby v. Cooper, 164 S.W. 152, 177 Mo. App. 354.

Mo.App. 1915. Evidence *held* to sustain a verdict on a claim against an estate for board and nursing furnished to the decedent.
Hays v. Miller's Estate, 173 S.W. 1096, 189 Mo.App. 72.

Mo.App. 1944. In a proceeding against decedent's estate for services as a farmhand, the jury were free to disregard the administrator's evidence and believe only plaintiff's evidence.
Savage v. Michalon's Estate, 176 S.W.2d 626.

⇐253. —— Hearing.

Mo. 1922. Evidence by claimant's two sisters and by other witnesses testifying to declarations of decedent *held* sufficient to take to the jury the question whether decedent had agreed to pay the claimant, who was his son, for his services in managing decedent's farm.
Brown v. Holman, 238 S.W. 1065.

Mo.App. 1908. Evidence on a claim against a decedent's estate by his child for services as his housekeeper *held* sufficient to carry to the jury the question whether there was an understanding between decedent and claimant for payment.
Cole v. Fitzgerald, 111 S.W. 628, 132 Mo. App. 17.

Mo.App. 1912. An instruction that, if plaintiff never demanded payment during decedent's lifetime for services in caring for and boarding him, it must be presumed that decedent paid for such services, and, before the jury could find for plaintiff under such circumstances, they must find that decedent did not pay, *held* sufficient to protect defendant.
Cole v. Waters, 147 S.W. 552, 164 Mo. App. 567.

Mo.App. 1914. In a proceeding for the allowance of a demand in favor of a son against the estate of his mother, founded upon a note, whether the note was supported by good and sufficient consideration *held*, under the evidence, for the jury.
Parker v. Parker's Estate, 164 S.W. 648, 181 Mo.App. 487.

Whether the note had been obtained by undue influence *held*, under the evidence, for the jury.
Parker v. Parker's Estate, 164 S.W. 648, 181 Mo.App. 487.

Mo.App. 1916. In suit against a decedent's estate for services rendered in the way of care, there being a conflict in testimony, the length of time deceased was away from plaintiff's home *held* for the jury.
Hinshaw v. Raines, 185 S.W. 1192.

Mo.App. 1917. Evidence *held* to justify submission to jury of question of indebtedness on note against estate claimed to have been settled before decedent's death.
Oviatt v. Weber, 194 S.W. 75.

For later cases see same Topic and Key Number in Pocket Parts

Where issue was whether note against estate had been paid, and not how it was paid, instruction authorizing finding for estate, "if you find * * * note sued on was paid in anyway," was not erroneous.
Oviatt v. Weber, 194 S.W. 75.

Mo.App. 1936. In action for services rendered decedent, failure to limit plaintiff's right to recover to those services rendered during five years immediately preceding death of decedent in instructions to jury *held* not erroneous, where evidence was directed to time within which plaintiff was entitled to recover, since jury is presumed to have considered the evidence in making up their verdict.
Warren v. Davis, 97 S.W.2d 159.

In action for services rendered in caring for decedent, charge on whether there was an intention to charge for services *held* not required to be submitted, where plaintiff was not member of deceased's family.
Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1944. In a proceeding against decedent's estate for services as a farm hand, where defendant's evidence merely presented a conflict, it was the province of the jury to determine it.
Savage v. Michalon's Estate, 176 S.W. 2d 626.

In a proceeding against decedent's estate, evidence that except for short interruptions plaintiff had worked for 31 years as a farmhand for decedent, who was paying him at the reasonable rate of $1 a day, but was keeping the money for him until plaintiff grew old, was sufficient to take the case to the jury and to show a continuous running account. Mo.R.S.A. § 1019, V.A.M.S. § 516.160.
Savage v. Michalon's Estate, 176 S.W. 2d 626.

In a proceeding against decedent's estate for services as a farmhand over a period of 31 years, an instruction that it was admitted that plaintiff performed services for decedent was not erroneous, in view of evidence of decedent's admissions that he was withholding the wages until plaintiff grew old, and of the fact that the real defense was the five-year statute.
Savage v. Michalon's Estate, 176 S.W. 2d 626.

In a proceeding against decedent's estate for services as a farmhand, an instruction concerning the amount of recovery was not erroneous, because not telling the jury to consider whether part of the services had been paid for by board, or to estimate the number of days worked before finding the amount due; good practice requiring that an instruction should not be too involved.
Savage v. Michalon's Estate, 176 S.W.2d 626.

In a proceeding against decedent's estate for services as a farmhand, an instruction that if decedent agreed to compensate plaintiff in money or property in addition to board and clothing, the jury should find for plaintiff for such amount as the services were reasonably worth, not to exceed $1 a day, less any amount paid, was correct, and did not give the jury a roving commission.
Savage v. Michalon's Estate, 176 S.W. 2d 626.

In a proceeding against decedent's estate for services as a farmhand, a brief instruction that where one party to a contract is dead the other party cannot testify except as to facts and contracts done or made since the administrator's appointment, and that plaintiff could not have testified as to any contracts with decedent, was correct, and was not required to explain the extent of plaintiff's incompetency as a witness. Mo.R.S.A. § 1887, V.A.M.S. § 491.010.
Savage v. Michalon's Estate, 176 S.W. 2d 626.

⇐254. —— Findings and decision.

For cases from other jurisdictions, see other Key Number Digests.

⇐255. Judgment.

Mo. 1877. In an action on a note by an executor, where the issue was whether such notes had been included in an allowance previously made in favor of defendant and against the estate, an instruction that the verdict of allowance was not conclusive evidence, in and of itself, that the note sued on had been adjudicated and passed on by the county court when the allowance was made, was proper.
Sweet v. Maupin, 65 Mo. 65.

Mo. 1896. A judgment of the probate court, in an action against an administrator allowing, as a valid claim against the estate, a purchase note given by the intestate, secured by a vendor's lien, is conclusive on the heirs, as well as the administrator, in an action by the vendor to foreclose his lien.
Moody v. Peyton, 36 S.W. 621, 135 Mo. 482, 58 Am.St.Rep. 604.

Mo.App. 1887. It is a sufficient answer to an objection that a claim was analogous to a petition containing two counts, since it claimed two different amounts for legal services rendered, that the first item was abandoned at the trial, and that the cause

was submitted to the jury only upon the second item.

Price v. Haeberle, 25 Mo.App. 201.

An objection that a claim was analogous to a petition containing two counts, since it claimed two different amounts for legal services rendered, which were separate causes of action, should be raised by motion in arrest of judgment.

Price v. Haeberle, 25 Mo.App. 201.

Mo.App. 1896. Under Rev.St.1889, §§ 191, 192, V.A.M.S. §§ 464.140, 464.300, demands, when presented, are subject to offsets and other defenses by the administrator, and, if exceeded by such offsets, judgment may be rendered for the administrator for the excess; and it necessarily follows that no valid judgment for an "offset" could be rendered by the probate court in favor of a claimant, unless a claim against him is first presented by the administratrix.

S. Albert Grocer Co. v. Painter's Estate, 66 Mo.App. 481.

Mo.App. 1896. A decree of the probate court allowing a claim against the estate of a decedent is conclusive on the parties as to the amount, and a payment made to the claimant by the administrator before the allowance cannot be deducted therefrom in a proceeding for the sale of decedent's real estate to satisfy the decree.

Jamison v. Wickham, 67 Mo.App. 575.

⇐256. Review.

⇐256 (1). In general.

Mo. 1952. If demand against estate of decedent filed in probate court is wholly insufficient, probate court acquires no jurisdiction to hear and determine claim and circuit court will acquire none on appeal.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1880. Revocation of letters as affecting subsequent allowance of claim on appeal. See,

Schwecke v. Mathias, 8 Mo.App. 569, memorandum.

Mo.App. 1940. An appeal was properly taken to the Court of Appeals from a judgment of the circuit court denying a claim for $459.62 against an estate after appeal from a judgment of the probate court granting the claim.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo.App. 1028.

Mo.App. 1949. The jurisdiction of circuit court on appeal from probate court in matter of claims against estate was no greater and no less than that which the probate court might itself have lawfully exercised.

Evans v. York, 216 S.W.2d 124.

⇐256 (2). Appealable orders.

For cases from other jurisdictions, see other Key Number Digests.

⇐256 (3). Right of review.

Mo.App. 1876. A distributee of an estate is entitled to appeal from an allowance to the guardian of decedent.

Murphy v. Murphy, 2 Mo.App. 156.

Mo.App. 1904. The administrator of an heir has the same right to appeal under the statute that the heir would have had.

Hammers v. Sanders, 80 S.W. 16, 106 Mo. App. 100.

Rev.St.1899, § 278, V.A.M.S. § 467.010, provides that any person having an interest in the estate of a decedent may appeal from the allowance of a demand in the probate court. A wife died, leaving an infant son, who died thereafter, being survived by his father. The wife left an estate. After the death of the child, appellant purchased the father's interest in the child's estate, which had descended from his mother, the personalty of whose estate was less than the claims presented against it. *Held*, that appellant had a right to appeal from a judgment of the probate court allowing a claim against the wife's estate, since it descended to the child, subject to the debts of the mother, and, on the death of the child, to the father, subject to the same debts.

Hammers v. Sanders, 80 S.W. 16, 106 Mo.App. 100.

⇐256(4). Presentation in lower court or tribunal of grounds of review.

Mo. 1876. Where, on appeal from the allowance of a claim by the probate court, no exceptions were taken or saved in the probate court, the circuit court can review nothing but error patent of record.

Paris v. Abbott, 64 Mo. 145.

Mo. 1887. An objection that the affidavit filed with a claim against a decedent's estate did not state, as required by statute, that claimant "has given credit to the estate for all payments and offsets to which it is entitled," cannot be first raised on appeal.

Childsey v. Powell, 4 S.W. 446, 91 Mo. 622, 60 Am.St.Rep. 267.

Mo.App. 1881. The claim that there is no evidence in the record as to when notice of letters was published, and it does not appear that the claim was presented within the first year of administration, and consequently that it does not appear that the claim

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was properly assigned to a certain class, is no ground of reversal. If the class was wrong, defendant should have called the attention of the trial court thereto.

Million v. Ohnsorg, 10 Mo.App. 432.

Mo.App. 1895. Where a claimant against an estate did not object to a ruling of the probate court in vacating the allowance of his claim against the estate, but consented to a retrial in such court, and engaged without objection in a trial in the circuit court, such claimant cannot object that such ruling of the probate court is not authorized by Rev. St.1889, § 213, V.A.M.S. § 464.310.

Elsenrath v. Kallmeyer, 61 Mo.App. 430.

Mo.App. 1901. Where the record, in an action to have a judgment allowed as a claim against the estate of a decedent, contains nothing to show whether or not the demand, when presented to the probate court for allowance, was supported by affidavit or oath in open court, that credit had been given the estate for payments and offsets, and no objection on such ground is made on the trial in the circuit court, such question cannot be considered on appeal.

Houston's Adm'r v. Thompson's Adm'r, 87 Mo.App. 63.

Mo.App. 1907. Where a claim was allowed against an estate, and upon the face of the record proper it is apparent that it was not allowable, objection can be taken at any stage of the case, whether or not a motion in arrest was filed below.

Beall v. Graham, 102 S.W. 636, 125 Mo. App. 38.

Mo.App. 1927. Defendant, not objecting in circuit court that amended statement was departure from claim in probate court, cannot make point on appeal.

Courtney's Estate v. Lanznar's Estate, 296 S.W. 269.

Mo.App. 1936. Oral objection to introduction of testimony relating to demand against decedent's estate, on ground of insufficiency of demand as filed in probate court, made in circuit court, *held* insufficient to preserve matter for consideration by Supreme Court on appeal from judgment of circuit court.

Warren v. Davis, 97 S.W.2d 159.

Mo.App. 1945. Objection cannot be made for first time on appeal and there was no evidence tending to establish execution, authenticity or delivery of assignment of claim for amount due.

Rudloff v. Werkheiser's Estate, 190 S. W.2d 279.

Mo.App. 1952. Where motion to dismiss claim against estate of decedent raised question of jurisdiction of court over subject matter, and issue thus raised was tried to court which sustained motion, no motion for new trial was necessary to preserve ruling of court for review. V.A.M.S. §§ 510.310, 512.160; Rules of Supreme Court, rule 3.23.

In re Gaebler's Estate, 248 S.W.2d 12.

⇐256(5). Requisites and proceedings for perfecting appeal.

Mo. 1880. The act establishing a probate court provided that appeals could be taken within 30 days after the rendition of the judgment appealed from. Wag.St. p. 119, § 2, regulating appeals, required appeals to be taken during the term at which the decision complained of was made, or within 10 days thereafter. The probate court allowed a claim January 20th, and adjourned court until February following, and finally the court was adjourned until the day fixed for the commencement of the next regular term, April 2d. On April 10th a notice of appeal was given. *Held*, that the appeal was too late.

State ex rel. Simms v. Todd, 72 Mo. 288.

Mo. 1939. Where there was no showing of any exception saved to ruling sustaining executrix' motion to dismiss claimants' appeal to circuit court from probate court's judgment dismissing claim, record did not show any request to file a satisfactory affidavit or any refusal of such request or any exception saved to such a refusal, and there was no motion for new trial affording circuit court an opportunity to correct error, if any, or preserve issue for review, neither affidavit for appeal from probate court nor executrix' motion to dismiss was before the Supreme Court for review. Mo.St.Ann. § 290, p. 184, V.A.M.S. § 467.080.

Amos v. Wetzel, 133 S.W.2d 361.

Mo. 1952. No formal pleadings are required in presentation of demands in probate court, nor on an appeal to circuit court.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1876. Under the statute requiring the administrator to file in the clerk's office of the probate court an affidavit of the names of the heirs, a certificate of the clerk of the probate court, stating that an affidavit on appeal from an order allowing a claim by decedent's guardian against her estate was filed by the attorney for one of the heirs of decedent, sufficiently shows that appellant was an heir and distributee, and entitled to appeal as such.

Murphy v. Murphy, 2 Mo.App. 156.

Mo.App. 1886. The statute provides that an applicant for an appeal from the probate court shall by himself or attorney file an affidavit, and that when the appeal shall be

taken in vacation the affidavit and bond shall be filed in the office of the clerk, and shall be subject to the approval of the judge or clerk. *Held* that, when the affidavit is filed, it is the duty of the clerk to certify the papers to the circuit court, and that filing of the affidavit is itself actual delivery to the clerk for that purpose, without regard to any action that he may take thereon, and that failure of the clerk to act thereon did not prejudice the rights of appellant.

Bensley v. Haeberle, 20 Mo.App. 648.

The statute provides that an applicant for an appeal from the probate court shall by himself or attorney file an affidavit, and that when the appeal shall be taken in vacation the affidavit and bond shall be filed in the office of the clerk, and shall be subject to the approval of the judge or clerk. *Held*, that on appeal by an administrator, where no bond is required, the filing of an affidavit in due time and proper form is in itself an application for appeal.

Bensley v. Haeberle, 20 Mo.App. 648.

Mo.App. 1908. Under Ann.St.1906, §§ 278, 281, providing for an appeal from the probate court to the circuit court that every appellant shall file a bond unless the appeal is taken by an executor or administrator, a person appointed to defend a demand of the administrator against the estate may appeal from the judgment of the probate court allowing the demand without giving a bond; such person acting as administrator, and having the right of appeal in his representative capacity.

Smith v. Smith's Estate, 110 S.W. 662, 131 Mo.App. 201.

Mo.App. 1917. Appellant, other than executor or administrator, from judgment allowing demand against decedent's estate, must, on taking appeal under Rev.St.1909, § 289, V.A.M.S. § 467.010, give appeal bond conditioned to pay all debts, damages, and costs adjudged against him.

McCormick v. Groh, 198 S.W. 445.

Mo.App. 1949. Where probate court held hearing on application for appeal from judgment against estate to determine interest of appellant, and documentary evidence was introduced showing him to be a son, but court found record failed to show interest and ordered affidavit for appeal stricken, but ten days later within term court found appellant to be an heir, later findings in effect nullified prior order striking affidavit, and court was bound under its own findings therefore to grant appeal and take further steps relating thereto as required by statute. Mo.R.S.A. §§ 15, 230, 283, 285, 287, 289-292, V.A.M.S. §§ 461.230, 465.170, 467.010, 467.030, 467.050, 467.070, 467.100.

State ex rel. Jones v. Davis, 216 S.W.2d 155, 240 Mo.App. 411.

⇐256 (6). Scope and extent of review.

Mo. 1840. When claimant neglects to make oath as required by Administration Act, art. 4, § 9 (Rev.Code, p. 56), and judgment is against his claim on other grounds, he cannot allege such neglect as ground for reversal.

Rankin v. Perry, 5 Mo. 501.

Mo. 1875. In the absence of any showing to the contrary, an amendment in the probate court, by an entry nunc pro tunc, of a judgment of the county court upon the allowance of a claim transferred to the former court, will be presumed to have been properly made.

Brooks v. Duckworth, 59 Mo. 48.

Mo. 1880. A finding of fact of the lower court on the issue of an account stated against the estate of a decedent, based on the credibility of conflicting testimony, will not be disturbed on appeal.

Schulenberg v. Cordell, 71 Mo. 414.

Mo. 1885. A claim against a decedent's estate, presented to the probate court, alleging that decedent was the guardian of plaintiff, and sold land belonging to him, and failed to account to him for the proceeds thereof, is in the nature of an action at law for money had and received, and not one of an equitable nature, in which the Supreme Court on appeal will review the weight of the evidence.

Thies v. Garbe, 88 Mo. 146.

Mo. 1898. Certificates of allowance by the probate court of claims against estates, which are not copied in the record, must be presumed to have been in proper form.

Gentry v. Field, 45 S.W. 286, 143 Mo. 399.

Mo. 1952. In enacting statute providing that probate court shall hear and determine demands in a summary manner without form of pleading, and shall take evidence of competent witnesses or other legal evidence, and in enacting statute prvoiding that, in case of appeal, court having appellate jurisdiction shall be possessed of cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in proceedings of probate court, Legislature intended to make it easy for persons not learned in law to present demands against estates in probate court and on appeal in circuit court without being held

to technical formalities and rules. V.A.M.S. §§ 464.280, 467.090.

In re Franz' Estate, 245 S.W.2d 1.

Mo.App. 1878. Conclusiveness on appeal of finding in favor of claim of maker of note against the estate of payee. See, Robison v. Colvin, 5 Mo.App. 588, memorandum.

Mo.App. 1882. The Court of Appeals cannot in order to determine at what date a demand was exhibited against an estate, look to the briefs of counsel or to the opinion of the judge of probate; but, in the absence of a showing in the record as to that fact, it must presume that date which will support the judgment of the lower court.

Williams v. Penn, 12 Mo.App. 393.

Mo.App. 1887. An appeal to the circuit court from the allowance of a claim against an administrator is in the nature of an action at law, and, where the verdict is sustained by the evidence, it cannot be assigned as error that the court erred in overruling appellant's motion for a new trial.

Price v. Haeberle, 25 Mo.App. 201.

Mo.App. 1887. The presentation in the probate court of a claim against an estate is in the nature of an action for the recovery of money, and, on its trial de novo in the circuit court before the judge sitting without a jury, it assumes the aspect of an action at law, and not of a suit in equity, and is subject on appeal to the same rules as an action at law in respect to the review of the evidence by the appellate court.

Todd v. Terry, 26 Mo.App. 598.

Mo.App. 1889. Since, under Rev.St. § 65, V.A.M.S. § 461.750, as amended March 3, 1888, the jurisdiction of the probate court allowing a claim against the estate of a decedent depends on certain facts, on appeal from such an allowance it would be presumed, in the absence of the evidence, that the necessary jurisdictional facts appeared.

Riggins v. O'Brien, 34 Mo.App. 613.

Mo.App. 1895. Where there was evidence upon which the jury could find that deceased owed plaintiff for the account sued for, the fact that plaintiff had made inconsistent statements since the death of deceased, which plaintiff denied, and that plaintiff owed deceased a note and interest, and had paid interest after the claim sued on had accrued, will not authorize the appellate court as a matter of law to say that deceased did not owe plaintiff.

Dobbs v. Cates' Estate, 60 Mo.App. 658.

Mo.App. 1901. In the absence of proof to the contrary, it will be presumed, on appeal from the allowance of a claim by the probate court, that the claim was verified as required by Rev.St.1899, § 195, V.A.M.S. § 464.250.

Wood v. Flanery, 89 Mo.App. 632.

Mo.App. 1902. A demand for an allowance of attorney's fees against an estate in process of administration is considered as an action at law. It should be treated as such on appeal, and hence a finding on conflicting evidence is not reviewable on appeal.

MacDonald v. Tittmann, 70 S.W. 502, 96 Mo.App. 536.

Mo.App. 1910. Plaintiff filed his claim against a decedent's estate for legal services rendered "as per agreement of 20 per cent.," but did not file the contract as required by Rev.St.1909, § 194, V.A.M.S. § 464.030, or otherwise show its nature or form. On appeal the circuit court gave judgment against him after trial to a jury. *Held*, that plaintiff could not contend, on a future appeal, that the execution of the contract not having been denied under oath, as required by Rev.St.1909, § 1985, V.A.M.S. §§ 509.100, 509.140, 509.150, 509.220, 509.240, the defendant could not contest it at the trial, since no written contract was filed or even alleged, and even had it been, the proceedings at the trial showing the contract to have been signed by both parties, section 1985, V.A.M.S. §§ 509.100, 509.140, 509.150, 509.220, 509.240, was not applicable.

Fenn v. Reber, 132 S.W. 627, 153 Mo. App. 219.

Mo.App. 1913. A recital, in a judgment of the probate court allowing a claim against an estate, that the case came on for trial by agreement of the parties is conclusive upon appeal.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

The Court of Appeals can correct an error in a judgment sustaining a claim against a decedent which is improper only because it orders execution to issue.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

Mo.App. 1921. Since proceedings on a claim by an administrator pendente lite to recover attorney's fees from the executors is a proceeding at law, the only question on appeal as to the findings of fact is whether there was substantial evidence to support them.

Baker v. St. Louis Union Trust Co., 234 S.W. 858.

Mo.App. 1940. In proceeding on claim against estate based on promissory note payable to deceased's sister-in-law but found in deceased's safety deposit box after his death

with a notation that it was there for safekeeping, whether note was delivered to payee *held* for trier of facts under the evidence.

Tarlton v. Johnson, 138 S.W.2d 49.

In proceeding on claim against estate based on promissory note signed by deceased and payable to his sister-in-law who, the evidence showed, had done work for deceased and wife, whether there was a consideration for the note *held* for trier of facts under the evidence.

Tarlton v. Johnson, 138 S.W.2d 49.

In proceeding on claim against deceased's estate based on note payable to deceased's sister-in-law and found in deceased's safety deposit box after his death, in which legatee claimed deceased had said before he died that he did not owe anyone, whether deceased did owe notes at time of his death was question of fact for trier of facts.

Tarlton v. Johnson, 138 S.W.2d 49.

In proceeding on claim against estate based on note payable to deceased's sister-in-law and found in deceased's safety deposit box after his death, admission of pocketbook and note therein both found in deposit box, which note stated that deceased wanted will carried out exactly as written and that pocketbook belonged to sister-in-law, *held* not reversible error.

Tarlton v. Johnson, 138 S.W.2d 49.

Mo.App. 1944. In a proceeding against decedent's estate for services as a farmhand, an instruction failing to limit recovery to $5,382, the amount prayed for, was not prejudicial to defendant, where the verdict was for only $4,000.

Savage v. Michalon's Estate, 176 S.W.2d 626.

⇐256(7). Amendments, additional proof, and trial of cause anew.

Mo. 1866. If an administrator fails to set up and file a set-off in the probate court, as authorized by Rev.Code 1855, art. 4, c. 2, § 9, against a claim presented for allowance against the estate, he cannot set it up at the trial of the appeal in the circuit court, pursuant to section 7 of article 9 of the same law, under which the court proceeds to try the cause anew, but on the same record received from the county court.

Berry v. Shackelford's Adm'rs, 38 Mo. 392.

Mo. 1874. Plaintiffs presented to a probate court a demand against the estate of a decedent, which claim was disallowed, and plaintiffs appealed to the circuit court. On the trial of the case before the circuit court, plaintiffs offered in evidence an affidavit, which one of them had filed, to the effect that they had given the estate credit for all past payments and offsets to which it was entitled and that the balance claimed was justly due. *Held*, that the court properly refused to admit the affidavit, as such an affidavit, although a prerequisite to the allowance of the claim, under 1 Wag.St. p. 103, § 12, is not intended to be used as evidence.

Dorn v. Parsons, 56 Mo. 601.

Mo. 1876. Plaintiff's statement of his demand against a decedent's estate in the probate court was for a certain number of acres of land at a certain price per acre, with interest thereon. On appeal to the circuit court, the statement was amended, showing that the amount claimed was for money overpaid in the sale of land; there being a deficit of the stated number of acres at the stated price per acre. *Held*, that the change of the settlement did not change the cause of action, and hence was allowable.

Hunt v. Bouton, 63 Mo. 187.

Mo. 1876. On appeal from the allowance of a claim by the probate court, the circuit court has no jurisdiction to try the cause anew.

Paris v. Abbott, 64 Mo. 145.

Mo. 1880. In a suit to establish a claim against the estate of a decedent, instituted in probate court and appealed to the circuit court, plaintiff asked leave to file a proposed amendment, which did not change the cause of action, but which consisted of additional credits given to the estate, which reduced the demand, and which tended to show mutual dealings and accounts between the parties, running through several years, avoiding the plea of limitations, if established. The application to file the amendment was accompanied by an affidavit to the effect that, after filing the original account, plaintiff had examined the books of the decedent, which showed that the estate was entitled to credits which plaintiff had omitted. *Held*, that it was error to refuse to permit the amendment.

Goddard v. Williamson's Adm'r, 72 Mo. 131.

Mo. 1885. On appeal to the circuit court from an allowance of a claim in the probate court, the executor is entitled to an order requiring the claimant to file a specific and definite statement of his claim in the manner provided by Rev.St.1879, § 188.

Watkins v. Donnelly, 88 Mo. 322.

Mo. 1910. Where the probate court rendered a judgment adjusting the claims against the estate of a deceased partner and the firm estate, under an agreement authorizing the rendition of a judgment subject to the right to appeal to the circuit court on the

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evidence taken before the referee appointed by the probate court, the parties on appeal to the circuit court were bound by the agreement, and the circuit court must dispose of the case on the evidence taken before the referee.

In re Jarboe's Estate, 127 S.W. 26, 227 Mo. 59.

Mo. 1912. Issue tried and contested on the trial of a demand filed against an estate *held* to be treated on appeal as within the pleadings, where it had been so treated on the trial, although the demand filed was defective.

Snider v. McAtee, 147 S.W. 136, 165 Mo. App. 260, affirmed 178 S.W. 484.

Mo. 1927. Claim filed against decedent's estate in circuit court over year after notice to creditors *held* barred as stating different cause of action than original claim in probate court for accounting. Rev.St.1919, §§ 74, 182, V.A.M.S. §§ 461.440, 464.020.

Sandwich Mfg. Co. v. Bogie, 298 S.W. 56, 317 Mo. 972.

Mo. 1946. Except for the demand which evidences the claim against the estate all pleadings setting up consistent defenses to the demand may be oral in the probate court and in the circuit court on appeal. Mo.R.S.A. §§ 197, 291, V.A.M.S. §§ 464.280, 467.090.

In re Thomasson's Estate, 196 S.W.2d 155, 355 Mo. 274, 170 A.L.R. 1170.

Mo. 1948. Failure of circuit court, on appeal from probate court, to reserve, until case was heard on merits, ruling on administrator's motion to dismiss probate demand on ground that demand split cause of action against estate growing out of a single transaction in that claimant's earlier demand based on same transaction had been filed, compromised and allowed, was not error, where issue was presented on face of the two demands after proof of filing and allowance of first demand had been made, and question arose on face of the two demands and had been raised by motion in the probate court. Mo.R.S.A. §§ 283, 291, V.A.M.S. §§ 467.010, 467.090.

Grue v. Hensley, 210 S.W.2d 7, 357 Mo. 592.

Mo.App. 1887. Where, on appeal to the circuit court from the judgment of the probate court allowing a claim against an administrator, an amended claim is filed, no objection can be made that such amended claim was not sworn to, as required by Rev. St. § 195, where the original claim was sworn to and the item of the amended claim is substantially in the language of the corresponding item in the original claim.

Price v. Haeberle, 25 Mo.App. 201.

Mo.App. 1902. In a proceeding of a circuit court on an appeal from the probate court, the statute of limitations may be invoked without a written plea; it being only needful to assert that defense clearly in the trial court.

Wencker v. Thompson's Adm'r, 69 S.W. 743, 96 Mo.App. 59.

Under Rev.St.1899, § 200, V.A.M.S. § 464.280, the probate court hears and determines demands against an estate "in a summary way, without the form of pleading," and on appeal to the circuit court such causes are tried anew without formal pleadings.

Wencker v. Thompson's Adm'r, 69 S.W. 743, 96 Mo.App. 59.

Mo.App. 1904. Under Rev.St.1899, § 4079, V.A.M.S. § 512.300, providing that the statement of plaintiff's cause of action may be amended in the appellate court to supply any omission when substantial justice will be promoted thereby, but no new item shall be added, a notice to an administrator containing receipts from decedent on which a claim against his estate is based, and stating that it will be presented for allowance, as required by section 197, § 464.150, on which notice the claim is tried in probate court, is not a nullity, but may be amended on appeal to the circuit court by adding a statement of the "amount and nature of the claim," as required by section 188, § 464.030.

Corson v. Waller, 78 S.W. 656, 104 Mo. App. 621.

A statement of plaintiff's cause of action, in proceedings in the probate court for the establishment of claims against the estate of a decedent, may be amended in the appellate court to supply any omission therein, when by such amendment substantial justice will be promoted; but no new item, or cause of action not embraced or intended to be embraced in the original statement, should be added by such amendment.

Corson v. Waller, 78 S.W. 656, 104 Mo. App. 621.

Mo.App. 1908. Where a corporation's claim against an estate was erroneously verified by the corporation's president as an individual, it could be presumed on appeal that such defect was supplied by parol proof in the probate court as necessary to show the court's jurisdiction under Rev.St.1899, § 285, Ann.St.1906, p. 438, V.A.M.S. § 467.090, providing that the circuit court on such an appeal shall be possessed of the cause and try and determine it without regarding any error, defect, or imperfection in the proceedings in the probate court.

Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

For references to other topics, see Descriptive-Word Index

Mo.App. 1913. In an action by a husband and wife to recover for services rendered the wife's deceased grandmother, a letter written by the wife stating that she did not expect to come into possession of anything when the grandmother died did not as a matter of law estop her from claiming compensation for her services.

Lambert v. Hodgdon, 154 S.W. 450, 172 Mo.App. 24.

Mo.App. 1914. On trial of claim against estate, order of probate court for administration by public administrator *held* properly admitted, notwithstanding recital that claimant was resident, this being in dispute, especially where there was no objection because of such recital.

Lipperd v. Lipperd's Estate, 163 S.W. 934, 181 Mo.App. 106.

Mo.App. 1917. In a proceeding for services between those formerly of the same family and still residing under the same roof, *held*, that the court should have required the jury before finding for plaintiff to find that the services were rendered with the expectation of receiving compensation, and that deceased either knew or should have known that compensation was expected.

Kleinberg v. Kinealy, 193 S.W. 981.

Mo.App. 1933. Whether deceased intended to pay daughter, and whether daughter expected compensation for household services and farmwork from 1898 to 1929, *held* for jury.

Miller v. Richardson, 56 S.W.2d 614.

Instruction sufficiently required jury to find as prerequisite to verdict for daughter that she, when rendering services, expected compensation, and that father intended to pay her.

Miller v. Richardson, 56 S.W.2d 614.

In daughter's action for services rendered deceased, instruction daughter could not testify regarding contracts between herself and deceased *held* properly given. Rev. St.1929, § 1723, V.A.M.S. § 491.010.

Miller v. Richardson, 56 S.W.2d 614.

Instruction putting on administrators burden of showing father's conveyance of farm to daughter was intended as payment for services *held* proper.

Miller v. Richardson, 56 S.W.2d 614.

Mo.App. 1935. Whether claimant cared for intestate under agreement with intestate's son calling for a dollar per day as complete compensation or under agreement whereby a dollar per day was to be advanced and credited on account and claimant was to make claim against estate for balance *held* for jury.

Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Whether intestate promised to pay claimant, his daughter, for services rendered in caring for intestate *held* for jury.

Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Instruction submitting question whether intestate promised to pay claimant $2.50 per day for services rendered deceased *held* not erroneous because authorizing recovery of reasonable value of services, not to exceed $2.50 per day, where evidence tended to prove express contract fully performed by claimant.

Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Refused instruction on estoppel of claimant to deny that she received a dollar per day in full settlement for services rendered intestate *held* unauthorized by evidence.

Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Instruction on accord and satisfaction of claim for services rendered intestate by receipt of a dollar per day *held* properly refused because not requiring finding that claimant accepted a dollar per day with intention that it should be full settlement, and because not clearly stating what constituted accord and satisfaction.

Aldridge v. Shelton's Estate, 86 S.W.2d 395.

Mo.App. 1940. Where documentary evidence on appeal to circuit court by administratrix from judgment of probate court allowing claim for building materials against estate of deceased member of alleged firm engaged in contracting business, affirmatively showed that there was such a firm, it was not necessary for the circuit court to submit to the jury the question of whether there was, or was not, such a firm.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo. App. 1028.

On appeal to circuit court by administratrix from judgment of probate court allowing claim for building materials against estate of deceased member of firm engaged in contracting business, letter written by firm member other than deceased on firm's stationery, asking whether claimant had shingles like the "ones I bought from you" and requesting that claimant "quote me prices," did not constitute even a "scintilla of evidence" that subsequent sale was to be made,

not to the firm but to the member who wrote the letter.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo. App. 1028.

On appeal to circuit court by administratrix from judgment of probate court allowing claim for building materials against estate of deceased member of firm engaged in contracting business, even though undisputed evidence showed that sale was made to firm and not to a firm member other than deceased, individually, circuit court was not permitted to direct a verdict for claimant, since administratrix was entitled to have jury determine the credibility of testimony offered by claimant, even though she offered nothing to contradict such testimony.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo. App. 1028.

On appeal to circuit court by administratrix from judgment of probate court allowing claim for building materials against estate of deceased member of firm engaged in contracting business, claimant was entitled to instruction that, if jury should find that firm member other than deceased, at time materials were purchased, told claimant's officer that agent was buying materials for firm, and that firm member other than deceased gave officer credit reference, and claimant checked references and found firm was good for its obligations, and, on strength thereof, delivered materials to truck driver, verdict should be for claimant, and administratrix was entitled to an instruction on the converse of the facts.

Missouri Steel & Wire Co. v. Edmonds & Allgier, 136 S.W.2d 118, 234 Mo. App. 1028.

Mo.App. 1941. In proceedings against executor of the estate of plaintiff's mother to recover from estate for board, nursing and care which plaintiff furnished to mother, executor's requested instruction that where family relation exists there is no presumption that services rendered by one member to another are to be paid for, and that such services can only be made the grounds of an action when they are rendered under a contract between parties should have been given.

Witte v. Smith, 152 S.W.2d 661, 237 Mo. App. 639.

Mo.App. 1942. Where statement filed by claimant in probate court did not declare upon an express contract, but sought recovery for room and board furnished decedent on quantum meruit, instructions submitting the cause as pleaded were proper.

Joseph v. Joseph, 164 S.W.2d 145.

In action against estate for reasonable value of room and board furnished decedent under decedent's promise to leave everything to claimant, instruction authorizing verdict for estate on finding that there was no contract, but a disposition to make a gift for services rendered by claimant, was proper.

Joseph v. Joseph, 164 S.W.2d 145.

Mo.App. 1945. Evidence was sufficient to make case for jury on issue whether woman filing claim against decedent's estate for household services rendered to decedent was paid therefor by decedent.

Ledbetter v. Allen's Estate, 183 S.W.2d 846.

Mo.App. 1946. In action in quantum meruit for reasonable value of services rendered to deceased, whether wife was entitled to sue alone without joining husband as a joint obligee was for the jury.

Neuf v. Hottes' Estate, 193 S.W.2d 393.

In action in quantum meruit for the reasonable value of services rendered to deceased at his instance and request, evidence regarding services rendered in operating tavern and restaurant, and intention of deceased to compensate therefor, was sufficient for jury.

Neuf v. Hottes' Estate, 193 S.W.2d 393.

Mo.App. 1947. Evidence was insufficient for jury as to whether there was a mutual understanding that daughter-in-law, who, together with her husband, was living in decedent's house as members of same household, was to receive pay for services rendered by her caring for decedent, so as to be entitled to recover from decedent's estate for such services.

Trantham v. Gullic, 201 S.W.2d 522.

⇐256(8). Determination and disposition of cause.

Mo.App. 1883. Entry of judgment. See, Ambs v. Caspari, 13 Mo.App. 587, memorandum.

Mo.App. 1892. The statute providing for an appeal from the probate court to the circuit court is complete, and contains no provisions authorizing judgment to be rendered in the circuit court against the appellant and the surety on the appeal bond, as in Rev.St. 1889, § 6349, V.A.M.S. § 512.320, in relation to appeals from justices of the peace.

Harrington v. Evans, 49 Mo.App. 372.

Mo.App. 1901. Where a judgment on appeal from the allowance of a claim by the probate court improperly awarded plaintiff execution, and was hence not warranted by Rev.St.1899, § 192, V.A.M.S. § 464.140, it

For references to other topics, see Descriptive-Word Index

would be set aside by the appellate court, and a proper judgment would be entered.
Wood v. Flanery, 89 Mo.App. 632.

Mo.App. 1914. Under Rev.St.1909, § 2083, V.A.M.S. § 510.310, judgment on claim against estate *held* not to be reversed because of award of execution, and court would render judgment and certify it to the probate court for classification.
Lipperd v. Lipperd's Estate, 163 S.W. 934, 181 Mo.App. 106.

On the trial of a claim against a decedent's estate, certified into a circuit court, the judgment for claimant should not have awarded execution, but should have been ordered certified to the probate court for classification against the state.
Lipperd v. Lipperd's Estate, 163 S.W. 934, 181 Mo.App. 106.

Mo.App. 1940. Where, after removal of executor, he gave check bearing date before removal in payment of balance due on allowed claim in accordance with agreement for its presentation after former executor had personally arranged for its payment, and settlement showing payment as of date of check was allowed but after dishonor of check three times payee notified court and administrator of the facts and of his intention to hold estate liable and administrator successfully insisted that credit allowed stand, circuit court properly gave judgment for amount of unpaid balance against estate together with interest, although no tender of the check was made prior to approval of former executor's account where judgment required delivery of check to administrator.
Griffin v. Priest, 137 S.W.2d 685.

The circuit court's judgment allowing claim rejected by probate court was not in excess of circuit court's jurisdiction as against contention that probate court had no jurisdiction to set aside or modify judgment settling former executor's account at a subsequent term of court and that therefore circuit court had no jurisdiction to set aside or modify such judgment on appeal from judgment of probate court entered at a subsequent term.
Griffin v. Priest, 137 S.W.2d 685.

⇐257. Costs.

Mo. 1835. Act 1825 provides that the probate court shall have the power to try and determine claims against decedents. Id. § 54, declares that the costs in such proceedings shall be paid by the party against whom judgment is rendered. Rev.Code, p. 111, § 49, prescribes that personal representatives shall not be required to pay debts within one year after the grant of letters, and that, if any person brings an action against them within the year, such person shall pay the costs thereof. Plaintiff presented an account to the county court for allowance within one year of the grant of letters. Judgment was rendered against him, and he appealed to the circuit court, where he had judgment in his favor. *Held*, that he was entitled to costs, though the demand was presented within one year, since section 49, above recited, relates to actions at law, and not to claims filed in the county court.
Gibbs v. Mann, 4 Mo. 55.

Mo.App. 1891. An administrator who seeks the allowance of a fraudulent demand in his own behalf against the estate is individually liable for costs on the disallowance of his claim.
Garr v. Harding, 45 Mo.App. 618.

Mo.App. 1892. Where heirs of a decedent filed a bond for appeal to a circuit court from a judgment of the probate court allowing a claim against the decedent's estate, and the circuit court renders judgment allowing the claim, with costs, the court cannot adjudge the costs against the heir and his sureties; Rev.St.1889, § 2920, V.A.M.S. § 514.060, providing that in civil cases the party prevailing shall recover his costs against the other party, unless otherwise provided by law, and section 2935, § 514.210, not being applicable to such a case.
Harrington v. Evans, 49 Mo.App. 372.

Mo.App. 1893. In an action against a decedent's estate, judgment was given for plaintiff in the probate court, and this judgment was afterwards set aside on the affidavit of a son and heir of the deceased, and a trial in the probate court resulted in the disallowance of the demand. On appeal to the circuit court the claim was allowed, but the son and heir did not appear as a party to the cause at any stage, after filing his affidavit to set aside the allowance in the probate court, until he made himself a party to an appeal from the circuit court. *Held*, that the costs in the circuit court should not have been taxed against him, but against the administrator.
Martin v. Nichols' Estate, 54 Mo.App. 594.

Mo.App. 1917. Where administrator ad litem defending against disputed claim stipulated that money advanced by him be taxed as costs, and the clerk allowed such costs, but credited them as paid, the remedy of the administrator is to file timely motion to retax costs, and claim cannot be filed against estate for such advancements.
In re McManus' Estate, 199 S.W. 422.

For later cases see same Topic and Key Number in Pocket Parts

(D) PRIORITIES AND PAYMENT.

⇐258. Authority and duty to make payment.

Mo. 1944. An executor is required by statute to pay claims against estate only to extent of assets of estate. Mo.R.S.A. §§ 17, 19, V.A.M.S. §§ 461.250, 461.270.

State ex rel. Bovard v. Weill, 182 S.W. 2d 521, 353 Mo. 337, 155 A.L.R. 191.

Mo.App. 1885. No order of distribution is necessary to authorize the administrator to pay the only claim against the estate.

Wilks v. Murphy, 19 Mo.App. 221.

Where a claim has been allowed against an estate, and the time of distribution is at hand, all other claims being barred, it is the duty of the administrator to pay such claim, and he has no right to recognize or pay a claim not probated.

Wilks v. Murphy, 19 Mo.App. 221.

Mo.App. 1916. Rev.St.Tex.1911, art. 3362, does not relieve an executor, whose testator has provided in his will that no other action can be had in relation to settling his estate than the probating and recording of his will, etc., from the duty and obligation to pay debts, as far as assets permit.

Hill v. Barton, 188 S.W. 1105, 194 Mo. App. 325.

Mo.App. 1945. Under statutes, claims against decedent's estate must be exhibited to administrator, presented to probate court for allowance and established by proof, and, until a claim has been allowed by such court or established by judgment of circuit court or other court of competent jurisdiction and classed by probate court, administrator has no right to appropriate any assets of estate to payment of claim. Mo.R.S.A. § 221, V.A.M.S. § 465.090.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

Under statute, no administrator or executor has right to pay alleged claims against decedent's estate, unless they are presented and allowed by a court having jurisdiction to do so, regardless of right and justice of claims.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐259. Statutory classification and order of payment.

⇐260. —— In general.

Mo. 1849. Where a judgment against the estate of a deceased person is presented in the probate court for allowance against the estate, it is the duty of that court to classify it among the debts due from the estate.

Wood v. Ellis, 12 Mo. 616.

Mo.App. 1882. Where a statute provides that claims exhibited within a year shall be placed in the fifth class, and those exhibited afterwards in the sixth, the classification of a claim exhibited after the year cannot be affected by the fact that it did not accrue until after the death of the intestate.

Williams v. Penn, 12 Mo.App. 393.

Mo.App. 1918. Under Missouri classification of demands against decedent's estate, there is no such claim as a "general" claim.

Raymuth Real Estate & Building Co. v. Robinson, 204 S.W. 276, 199 Mo.App. 515.

Mo.App. 1932. Probate court is without authority to grant a claimed priority against an estate, because statute specifies only six classes of claims, none of which embrace preferential or prior claims. Rev.St.1929, § 182, V.A.M.S. § 464.010.

Dietrich v. Jones, 53 S.W.2d 1059, 227 Mo.App. 365.

⇐261. —— Particular classes of claims.

Mo. 1842. Where a judgment has been obtained against decedent in his lifetime, an execution cannot be issued thereon, but it must take its place under the act concerning administration.

Sweringen v. Eberius' Adm'r, 7 Mo. 421, 38 Am.Dec. 463.

Judgments obtained in a sister state are not entitled, under our administration act, to be classed in the fourth class of claims against the estates of decedents; they are entitled to no preference over any other debts.

Mo. 1855. Harness v. Green's Adm'r, 20 Mo. 316.

Mo. 1860. Gainey v. Sexton's Adm'r, 29 Mo. 449.

Mo. 1862. An owner of land to which an heir set up an adverse claim took an assignment of a judgment against the intestate and his surety on an official bond of the intestate, and, after his judgment had been filed as a claim of the fourth class against the estate, agreed with the heirs, for a valuable consideration, not to enforce the judgment against lands of the intestate except those in controversy. The owner also, for a valuable consideration, agreed with the surety not to enforce the judgment against him, except to protect title to the lands in controversy, the surety having knowledge of the agreement with the heirs, and having filed his claim against the estate in the fifth class. *Held* that, on assets of the estate remaining in the hands of the administrator on final settlement from sales of land other than those in controversy, the lien of the judgment

was superior to that of the claim of the surety.

Hempstead v. Hempstead's Adm'r, 32 Mo. 134.

Mo. 1869. A statute prescribing the classification of debts of deceased persons included in the fourth class "all judgments rendered against the deceased in his lifetime"; in the fifth class, "all demands, without regard to quality, exhibited within one year"; and in the sixth class, "all demands thus exhibited after the end of one year." *Held*, that the term "all demands," spoken of as belonging to the fifth class, meant, "all demands except judgments"; and the same term, when it referred to those embraced in the sixth class, meant "all demands, including judgments."

State Bank v. Tutt, 44 Mo. 366.

Mo. 1883. Gen.St.1865, c. 123, § 1, provides that all demands which shall be legally exhibited against the estate of a decedent within one year after the granting of the first letters shall be placed in the fifth class, and all demands exhibited after the end of one year and within two years go to the sixth class. *Held* that, where a claim is not presented within one year, the creditor is not entitled to have his claim placed in the fifth class by showing that at the time of the allowance there had been in fact no distribution of the assets.

Burckhartt v. Helfrich's Adm'r, 77 Mo. 376.

Mo. 1890. Under Rev.St.1879, § 658, providing that "all contracts which, by the common law, are joint only, shall be construed to be joint and several," demands against a partnership are several as well as joint; and, under sections 184, 212, providing for the classification of all demands against the estate of a decedent, and the payment of the demands so classified "pro rata," according to classification, a demand against a partnership is entitled to share equally with the individual debts of one of the partners, in the administration of his estate.

Hundley v. Farris, 13 S.W. 392.

Mo. 1897. A final order of the probate court, made under Laws 1885, p. 27, directing an administrator in final settlement of an estate to deliver certain described notes to a trustee for collection, and the distribution of their proceeds, is not a final judgment against said administrator for the amount of the notes. Consequently the claim of the trustee against the estate of the administrator, who died without delivering the notes, was not one of the fourth class, under Rev. St.1889, § 183, V.A.M.S. § 464.010, providing that judgments against the deceased in his lifetime are claims of the fourth class.

Rutledge v. Simpson's Adm'r, 42 S.W. 820, 141 Mo. 290.

Mo. 1908. Rev.St.1899, § 184, Ann.St. 1906, p. 397, V.A.M.S. § 464.010, (Administration Act), provides that all demands against the estate of any deceased person shall be divided into classes; the third class, "All debts, including taxes due the state or any county," etc., and that it shall be the duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance. Section 9246, Ann.St.1906, p. 4248, § 140.730, under the title "Revenue," provides that personal tax bills shall be presented and allowed against the estates of deceased or insolvent debtors in the same manner and with like effect as other indebtedness of said debtors. *Held*, that for such purposes of allowance and classification a tax may be treated as a debt.

State ex rel. Karrenbrock v. Mississippi Valley Trust Co., 108 S.W. 97, 209 Mo. 472.

Rev.St.1899, § 4259, Ann.St.1906, p. 2334, (Laws 1881, p. 35, § 1), V.A.M.S. § 430.330, entitled "Assignments, Priority of State's Lien: An act to secure to the state of Missouri a priority of lien in the case of insolvent debtors to the state," provides that whenever any person indebted to the state is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due the state shall be first satisfied, provided that nothing in the act shall be construed to interfere with the payment of the expenses of the last sickness, wages of servants, demands for medicines and medical attendance during the last sickness of the deceased, nor funeral expenses. Section 4260 (section 2, p. 36), § 430.340, provides that every executor, administrator, etc., who pays any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due the state from such person or estate, shall become answerable in his own person and estate for the debts so due the state, etc. The emergency clause of the act of 1881 (section 4, p. 36) provides that whereas a doubt may be entertained by some as to the priority of the state in the case of insolvent debtors, etc., an emergency exists within the meaning of the Constitution why this law should go into immediate operation, etc. *Held*, that such sections are not applicable to the collection of taxes against the

estate of a decedent, where no insolvency exists.

State ex rel. Karrenbrock v. Mississippi Valley Trust Co., 108 S.W. 97, 209 Mo. 472.

Mo. 1940. That Missouri court rendered judgment on claim based on judgment rendered in another state did not in itself entitle demand against estate to be placed in fourth class, where Missouri judgment was rendered after deceased's death, although suit was commenced before his death. Mo.St.Ann. § 182, p. 108, V.A.M.S. § 464.010.

Cook's Estate v. Brown, 140 S.W.2d 42, 346 Mo. 281, 128 A.L.R. 1396.

Demand founded upon judgment rendered upon a warrant of attorney by court of sister state during deceased's lifetime was not entitled to be placed in fourth class in claims against estate of deceased, since word "judgment", in statute placing demand founded upon judgment in fourth class, refers only to domestic judgments. Mo.St. Ann. § 182, p. 108, V.A.M.S. § 464.010.

Cook's Estate v. Brown, 140 S.W.2d 42, 346 Mo. 281, 128 A.L.R. 1396.

Mo. 1943. An attorney's claim for services rendered an intestate's estate is not a "demand" within the non-claim statutes and is not subject to classification. Mo.R.S.A. §§ 182, 186, V.A.M.S. §§ 464.020, 464.040.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

The statutes requiring the probate court to allow to personal representatives reasonable charges for legal services, and giving such charges priority, apply to all settlements of such representatives whether intermediate or final, and do not fix a limitation for presentation of such claims. Mo.R. S.A. §§ 220, 224, V.A.M.S. §§ 465.100, 465.110.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1887. Under Rev.St.1879, § 184, providing that all demands against the estate of a decedent shall be divided into classes, so that "all debts, including taxes due the state or any county or incorporated city or town," shall constitute one class, a demand for taxes may be presented for allowance and classified for payment with like effect as if it were an ordinary debt.

State ex rel. Sexton v. Donaldson, 28 Mo.App. 190.

Mo.App. 1889. Rev.St. § 184, subd. 5, V.A.M.S. § 464.020, relative to the administration of estates and classification of demands, provides that all demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate, shall be placed in the fifth class of demands. Rev.St. § 87, V.A.M.S. § 461.450, provides that, within 30 days after letters are granted, the executor or administrator shall publish in some newspaper a notice that letters had been granted, and requiring all persons having claims to present them, etc. *Held*, that a claim presented more than one year after letters are granted, but within one year after notice has been published, is not entitled to be classified in the fifth class.

Jones v. Davis, 37 Mo.App. 69.

Mo.App. 1897. Rev.St.1889, § 183, V.A. M.S. § 464.010, provides that all demands against an estate shall be divided into six classes; that all demands, without regard to quality, which shall be legally exhibited against an estate within one year after the granting of the first letters on the estate, shall be assigned to the fifth class, except those belonging to the first, second, third, and fourth classes; that all demands thus exhibited and presented to the court for allowance after the end of one year, and within two years, after letters granted, shall be assigned to the sixth class. A demand founded on an account for funeral expenses was exhibited to the administrator within a year, and presented to the court within two years, after the grant of letters. *Held*, that the demand should be placed in the first class.

Walley v. Gentry, 38 Mo.App. 298.

Where judgments were obtained against the estate of a decedent, and certified to the probate court for allowance, that court should have directed the same per cent. of the face value of such judgments to be paid which had been paid in previous orders of the court upon previously allowed demands of the same class.

Mo.App. 1899. In re Simpson's Estate, 81 Mo.App. 582.

Mo.App. 1899. Leahy v. Simpson, 81 Mo.App. 582.

Mo.App. 1899. Where the title holder of judgments is not asking process of execution, nor to enforce any judgment lien, but only asks that these judgments, which merged the demands upon which they were founded, be assigned to that class which Rev.St.1889, § 183, subd. 4, V.A.M.S. § 464.010, expressly provides for "all judgments rendered against the deceased in his lifetime," it is not error to order the judgments to be assigned to the fourth class of claims or demands against the estate of the intestate, even though they have not been revived by scire facias within 10 years after their rendition, as provided for by Rev.St.1889, § 6013, V.A.M.S. § 511.370.

Tonnies v. McIntyre, 82 Mo.App. 268.

For references to other topics, see Descriptive-Word Index

Mo.App. 1911. A claim for funeral expenses, if legally exhibited against decedent's estate within a year after the granting of the first letters on the estate, is entitled to priority over all other claims, but, if not exhibited until after the expiration of a year and within two years, it is only allowable as a claim of the sixth class, as provided by Rev.St.1909, § 190, V.A.M.S. § 464.-010.

Cape Girardeau Bell Tel. Co. v. Hamil, 140 S.W. 951, 160 Mo.App. 521.

Mo.App. 1912. Under Rev.St.1909, §§ 190, 191, 216, by section 99, V.A.M.S. §§ 461.-770, 464.010, 464.020, 464.130, made applicable to the administration of partnership estates, *held*, that claim of a partnership creditor was not precluded from allowance and classification because subject to equitable rights of other creditors of the same class.

In re D. D. Perkins & Co.'s Estate, 148 S.W. 969, 166 Mo.App. 170, transferred from Court of Appeals White Cloud Milling & Elevator Co. v. Thomson, 175 S.W. 897, 264 Mo. 595.

Rev.St.1909, §§ 99, 190, 191, 216, V.A.M.S. §§ 461.770, 464.010, 464.020, 464.130, relating to claims against partnership estates, *held* to merely provide a method of procedure and not to have any effect on the equities and priorities between creditors.

In re D. D. Perkins & Co.'s Estate, 148 S.W. 969, 166 Mo.App. 170, transferred from Court of Appeals White Cloud Milling & Elevator Co. v. Thomson, 175 S.W. 897, 264 Mo. 595.

Mo.App. 1926. "Servants" as used in Rev.St.1919, § 181, V.A.M.S. § 464.010, classifying demands against estates, *held* to mean domestics, and not to include clerk in store of deceased whose work was confined to store itself.

Kinder v. Schlesinger, 287 S.W. 1072, 220 Mo.App. 596.

Wages which Rev.St.1919, § 181, V.A.M.S. § 464.010, intends to be assigned to second class of claims against estates are those accruing during deceased's last sickness.

Kinder v. Schlesinger, 287 S.W. 1072, 220 Mo.App. 596.

Mo.App. 1928. Claim for services rendered third person at decedent's request and filed within last six months of year allowed therefor *held* sixth-class claim. Rev.St.1919, § 181, V.A.M.S. § 464.010.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, which conformed to 15 S.W.2d 1116.

Mo.App. 1928. Judgment was preferred claim against deceased judgment debtor's estate. Rev.St.1919, § 1568, V.A.M.S. § 511.550.

King v. Hayes, 9 S.W.2d 538, 223 Mo. App. 138.

Mo.App. 1932. Probate court had duty to classify claim against estate for services rendered as night watchman in fifth class. Rev.St.1929, § 182, V.A.M.S. § 464.010.

In re Kellam's Estate, 53 S.W.2d 401, 227 Mo.App. 291.

Mo.App. 1932. Parties who became subrogated to claim, timely filed in probate court, but not finally adjudicated until some 6 years later, were entitled to have claim classified and to participate to extent of subrogation, though their petition was filed more than eight years after granting of letters of administration. Rev.St.1929, §§ 182, 189, V.A.M.S. §§ 464.010, 464.080.

Dietrich v. Jones, 53 S.W.2d 1059, 227 Mo.App. 365.

Mo.App. 1933. Lien of judgment is not extinguished by debtor's death, but thereafter no execution is allowed on judgment which must be classified in probate court as other demands.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Where debtor's estate is solvent, judgment lienholder is entitled to payment of lien in case of sale of realty before proceeds become assets of estate, but in case of insolvency funeral expenses, expenses of last sickness, and costs of administration of estate are given precedence over judgment lien. Rev.St.1929, §§ 150, 182, subds. 1, 2, 189, 225, V.A.M.S. §§ 463.230, 464.010.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Statute regarding application of proceeds of deceased's realty to liens must be construed in connection with statute making provision for classification of claims against estate. Rev.St.1929, §§ 150, 182, V.A.M.S. §§ 463.230, 464.010.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Costs of administration of estate take precedence over all claims. Rev.St.1929, § 225, V.A.M.S. § 465.110.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Mo.App. 1944. An allowance of fee for a public administrator's attorney was an "expense of administration," taking priority under statute over claims of creditors of de-

ceased's estate. Mo.R.S.A. § 224, V.A.M.S. § 465.080.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

⇐262. —— Proceedings for classification.

Mo. 1851. To change the class to which the probate court has assigned a demand against an estate is to change the force of the judgment as to creditors in the prior class, and it should not be done, but upon such facts as would authorize the court to set aside or modify its judgment in other respects; and the fact that the claimant had evidence of the prior presentation of the demand to the executor, which he neglected to offer the probate court when the demand was allowed and classed, does not authorize the court to change the class afterwards; nor can the claimant rely upon the report of the executor, as it is not evidence of classification, not being made for that purpose.

Miller v. Janney's Ex'r, 15 Mo. 265.

Mo. 1852. The statute does not require that a classification of a demand should be entered on the record at large. An indorsement of its class on the claim itself, and an entry on the abstract book, are all that are required to give the allowance and classification validity.

Nelson v. Russell's Adm'rs, 15 Mo. 356.

The classification of a demand against an estate, if erroneous, should be appealed from when made. The county court has no right to change it at a subsequent term, after the administrator has exhausted the assets in the payment of debts.

Nelson v. Russell's Adm'rs, 15 Mo. 356.

Mo. 1856. The priorities secured by bringing an action against an administrator under the statute of Missouri, classifying claims against estates of deceased persons, are not lost by voluntarily becoming nonsuit.

Tevis v. Tevis' Adm'r, 23 Mo. 256.

Mo. 1874. The remedy of a creditor whose claim has been sacrificed by the error of a clerk of probate assigning the claim of another creditor, through an erroneous memorandum of the judge, to the wrong class in the order of the administrator's settlement, is by motion for a correction nunc pro tunc, and not by injunction to compel the administrator to assign the claim to the proper class. In the absence of fraud or collusion, the plaintiff had no equity against the other creditor.

Jillett v. Union Nat. Bank, 56 Mo. 304.

Mo. 1883. Under Wag.St. p. 36, § 19, providing that, within 30 days after letters of administration are granted, the administrator shall publish a notice that letters testamentary have been granted, requiring all persons to exhibit their claims for allowance within one year from the date of the letters, a claimant who presents his demand after the lapse of one year from the date of the letters of administration must prove that he exhibited the claim to the administrator within the year after the publication of the notice.

Madison County Bank v. Suman's Adm'r, 79 Mo. 527.

Mo. 1885. In a proceeding by motion, under Rev.St. § 736, for an execution against a stockholder on account of an unpaid balance of his stock, the final adjudication on motion may be regarded and treated as a demand against the estate on the death of the stockholder pending the suit, and it may be classified as such.

Marks v. Hardy, 86 Mo. 232.

Mo. 1901. Where a judgment against the defendant's testator was presented to the probate court for classification, and an appeal taken to the circuit court, the proceedings therein are the same as if an action on the judgment had been commenced in the circuit court, and any defense available in such an action may be interposed in the action tried on appeal.

McFaul v. Haley, 65 S.W. 995, 166 Mo. 56.

Mo. 1934. After judgment in circuit court to establish claim against estate, it is necessary for probate court to classify claim. Mo.St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107.

Mo.App. 1899. Probate courts have jurisdiction and are required to make orders of distribution for the payment of debts at each annual settlement of an administrator, under Rev.St.1889, §§ 226, 227, V.A.M.S. §§ 465.110, 465.120.

Elstroth v. Young, 78 Mo.App. 651.

Mo.App. 1912. Judgments of probate courts allowing and classifying demands against estates are judgments possessing the attributes of judgments of courts of general jurisdiction.

In re D. D. Perkins & Co.'s Estate, 148 S.W. 969, 166 Mo.App. 170, transferred from Court of Appeals, White Cloud Milling & Elevator Co. v. Thomson, 175 S.W. 897, 264 Mo. 595.

A judgment of a probate court allowing and classifying a claim against a partnership estate unappealed from within the time allowed by law is res adjudicata as to all is-

For references to other topics, see Descriptive-Word Index

sues properly belonging to the cause on which the judgment is founded.

In re D. D. Perkins & Co.'s Estate, 148 S.W. 969, 166 Mo.App. 170, transferred from Court of Appeals, White Cloud Milling & Elevator Co. v. Thomson, 175 S.W. 897, 264 Mo. 595.

Mo.App. 1919. A proceeding in the probate court to classify judgment against the estate of a decedent is not a mere ministerial or clerical act, and may involve a trial of fact, as where a judgment is against the deceased in the wrong name.

Green v. Strother, 212 S.W. 399, 201 Mo.App. 418.

Under Rev.St.1909, §§ 197 and 206, V.A.M.S. §§ 464.080, 464.280, it is unnecessary in a proceeding before the court of probate to obtain the allowance and classification against an estate of a judgment rendered against the deceased in a wrong name to file any formal pleadings.

Green v. Strother, 212 S.W. 399, 201 Mo. App. 418.

Where a judgment was rendered against deceased in a wrong name, the probate court, in proceeding to have the same allowed and classified against the estate, cannot render a money judgment against the estate, and a judgment for a fixed amount is void.

Green v. Strother, 212 S.W. 399, 201 Mo.App. 418.

Mo.App. 1927. Petition by state finance commissioner asking for lien against decedent's assets *held* not to state cause of action for preference.

Millspaugh v. Akin, 299 S.W. 596.

Mo.App. 1939. A demand against estate may be established by reducing it to judgment in a circuit court and thereafter filing it in the probate court for classification as an allowed claim. Mo.St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

Sanders v. Savage, 129 S.W.2d 1061, 234 Mo.App. 9.

⇐263. Rights of creditors to priority.

Mo. 1825. A judgment recovered by the state against an administrator for money collected as a public officer has no priority over a judgment confessed by defendant in his lifetime, though the money was then due the state.

Finley v. Caldwell, 1 Mo. 512.

Mo. 1884. Where a note has been allowed as a demand against the estate of the maker, and the clerk's certificate of allowance and classification has been indorsed on the note, an assignee of the judgment of allowance has a superior claim on the estate to the assignee of the note.

Julian v. Calkins, 85 Mo. 202.

Mo. 1890. The distributees and legatees, to whom a trust results where executors or administrators purchase property with money belonging to the estate, have no preference over other creditors, where the means of identification of the property fail.

Phillips v. Overfield, 13 S.W. 705, 100 Mo. 466.

Mo.App. 1889. Under Rev.St. U. S. §§ 3466, 3467, 31 U.S.C.A. §§ 191, 192, providing that, whenever the estate of any deceased debtor is insufficient to pay all the debts due from deceased, the debts due to the United States shall be first satisfied, and that every executor or administrator, who pays any debt due by the estate before he satisfies and pays the debts due to the United States, shall become answerable personally, etc., an administrator is justified in paying claims due to the United States, although they had not been classified as preferred claims; and no order of the probate court is necessary to justify him in so doing.

United States v. Hahn, 37 Mo.App. 580.

Mo.App. 1901. Creditors must in all cases be postponed to the necessary burdens of administration.

Elstroth v. Young, 88 Mo.App. 418.

Mo.App. 1918. Building company which employed agent to collect rents, who did so, and died insolvent owing it, cannot charge assets of estate with special lien on ground funds collected by agent as rentals went to increase his assets.

Raymuth Real Estate & Building Co. v. Robinson, 204 S.W. 276, 199 Mo. App. 515.

⇐264. Secured claims.

⇐264(1). In general.

C.C.A.Mo. 1926. Where joint guarantor paid interest, he acquired equity in collaterals superior to other guarantor's estate, and its creditors could not insist that collaterals be first exhausted before recourse be had against estate. Rev.St.Mo.1919, § 188, Mo. St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

Pierce v. National Bank of Commerce in St. Louis, 13 F.2d 40, certiorari denied 47 S.Ct. 240, 273 U.S. 730, 71 L. Ed. 863.

Mo. 1872. Where an administrator, under section 10, art. 3, of the Administration Act, sells the title of decedent in certain lands, a creditor, whose claim is secured by deed of trust of the land sold, is not compelled to look to his deed of trust alone, but

For later cases see same Topic and Key Number in Pocket Parts

may satisfy his debt out of the general assets in the hands of the administrator.

Welton v. Hull, 50 Mo. 296.

Mo. 1888. A creditor need not rely on his mortgage security alone, nor is he required to first exhaust the same. He may prove up his debt, and is then entitled to be paid out of the assets of the estate.

Day v. Graham, 11 S.W. 55, 97 Mo. 398.

Mo. 1892. The fact that demands exhibited against an estate within a year after the granting of letters of administration are of a higher class than those exhibited thereafter is of no importance in an action to foreclose a mortgage on land belonging to the estate, though it may be if thereafter an allowance for a deficiency is asked against the general estate.

Tucker v. Wells, 20 S.W. 114, 111 Mo. 399.

Mo.App. 1902. Rev.St.1899, § 191, V.A.M.S. § 464.080, declaring that when a claim is allowed against an estate which is secured by mortgage or other lien held by the creditor, the same may be allowed as other claims, but shall not be paid until such security held by the claimant has been exhausted, applies to a claim on a debt secured by mortgage, allowed against the estate of a decedent, who had purchased mortgaged realty and assumed the mortgage debt.

Knight v. Newkirk, 92 Mo.App. 258.

Mo.App. 1907. The primary idea of a security is that it may be used to pay the debt if the debtor fails to pay it from other sources; and a debtor should promptly pay his debt without letting it go to protest or by default, thus putting the creditor to the trouble of a resort to the security, and the same duty rests on the debtor's estate after his death, except that of necessity it must first be allowed and classified.

Darr v. Thomas, 106 S.W. 95, 127 Mo. App. 1.

Rev.St.1899, § 191, Ann.St.1906, p. 403, V.A.M.S. § 464.080, providing that claims against an estate which are secured by mortgage, deed of trust, or other lien, shall not be paid until the security held by the claimant has been exhausted when construed in connection with section 143 [page 383], § 462.360, empowering the probate court, where it is for the best interest of the estate, to order a mortgage debt paid out of the general assets, with sections 146 and 170 [pages 384, 393], V.A.M.S. §§ 463.150, 463.170, declaring that real estate may be sold to pay debts of a decedent only when there is not sufficient personalty to pay them, with section 184, subd. 4 [page 397], V.A.M.S. § 464.010, providing that judgments against the estate of an intestate shall be classified and paid as provided by sections 152–155 [pages 388–389] §§ 463.210–463.240, except that if the estate be insolvent they shall be paid by the administratrix selling the lands at administration sale under order of the probate court and not by the creditor exhausting the lands by closing the lien, and with section 138 [page 382], § 462.310, providing that the probate court may order a vendor's lien creditor of an estate paid out of the assets, is not to be taken as prohibiting an administratrix to pay secured debts against the estate until the security has been first exhausted by the creditor; and where a husband died intestate, leaving a debt secured by deed of trust on the homestead, executed by himself and wife, and sufficient personal property to satisfy the same, his widow, as administratrix, may pay the secured debt out of the personal estate, the intention of section 191 § 464.080, being to protect unsecured creditors by empowering them to compel the secured creditors, where the estate was insufficient to satisfy all, to first exhaust their security before sharing in the common fund.

Darr v. Thomas, 106 S.W. 95, 127 Mo. App. 1.

Ordinarily a secured creditor can lay by his security and go upon the general estate of his debtor to satisfy his claim, only resorting to his security when he fails to collect his claim by the ordinary proceeding.

Darr v. Thomas, 106 S.W. 95, 127 Mo. App. 1.

Mo.App. 1921. After the death of the maker of notes who pledged collateral to secure their payment, defendants could not, by purchasing the notes held by a bank, obtain the benefits of the surplus of the collateral pledged with the notes in satisfaction, pro tanto, of their own unsecured claims, thus preferring themselves as creditors of the pledgor's insolvent estate.

Hornsby v. Knorpp, 232 S.W. 776, 207 Mo.App. 302.

⇐264 (2). Effect of allowance or presentation of claim.

C.C.A.Mo. 1926. Where joint guarantor paid interest, he acquired equity in collaterals superior to other guarantor's estate, and its creditors could not insist that collaterals be first exhausted before recourse be had against estate, and payee, having filed claim and received dividend, could not thereafter voluntarily surrender dividend and hold joint guarantor liable. Rev.St.Mo.1919, § 188, Mo. St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

Pierce v. National Bank of Commerce in St. Louis, 13 F.2d 40, certiorari de-

nied 47 S.Ct. 240, 274 U.S. 730, 71 L. Ed. 863.

Mo.App. 1896. Claims against the estate of a decedent allowed in the probate court have priority over a deed of trust executed by the heir to the land owned by decedent, although the money secured by such trust deed was used in discharging other trust deeds placed on the land by decedent.

Lemmon v. Lincoln, 68 Mo.App. 76.

⇐265. Claims of executor or administrator.

Mo. 1852. The common-law doctrine of retainer, in favor of executors and administrators, is abolished by statute.

Nelson v. Russell's Adm'rs, 15 Mo. 356.

⇐266. Advances to pay claims.

Mo. 1846. Where executors give their own notes for a debt in which their testator was surety and indemnified, and pay the same, they will be entitled to be paid in full out of the estate.

Hill v. Buford, 9 Mo. 869.

Mo. 1892. An administrator is not entitled to interest on money advanced by him for the use of the estate.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo.App. 1904. One paying, without authority, to the mortgagee, after the death of the mortgagor, the balance due on the mortgage debt, cannot recover the sum so paid from the mortgagor's estate.

Falls v. Jones, 81 S.W. 455, 107 Mo.App. 357.

⇐267. Interest.

Mo. 1872. Interest may be awarded on the amount claimed against the estate of a deceased person, although not called for in the notice presented to the administrator.

Harwood v. Larramore, 50 Mo. 414.

Mo. 1902. Under Rev.St.1899, § 3705, V.A.M.S. § 408.020, providing that creditors shall be allowed to receive interest at the rate of 6 per cent. per annum on accounts after they become due and demand of payment is made, a creditor of a decedent whose claim is allowed against his estate is entitled to 6 per cent. interest thereon from the date of demand of payment of an administrator pendente lite.

Ryans v. Hospes, 67 S.W. 285, 167 Mo. 342.

Mo.App. 1934. In suit against administrator on deceased's contract to pay plaintiff for services to deceased's daughter by providing for plaintiff in his will, plaintiff *held* not entitled to interest from death of daughter, who predeceased father, where no suit could have been brought on contract against deceased during his lifetime. Mo.St.Ann. § 2839, p. 4623, V.A.M.S. § 408.020.

Helsley v. Ferguson, 67 S.W.2d 103, 228 Mo.App. 386.

⇐268. Attorney's fees and expenses of creditors.

For cases from other jurisdictions, see other Key Number Digests.

⇐269. Compromises by creditors.

Mo. 1947. An administrator has the usual powers of a trustee, including power to compromise actions on doubtful claims as the circumstances may justify.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Administratrices had authority with approval of probate court to enter into compromise settlement of all claims of decedent's putative widow against estate, even though such claims incidentally involved title to decedent's realty. Mo.R.S.A. §§ 120, 233, V.A.M.S. §§ 462.160, 462.280.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Mo.App. 1906. As an administrator has no power to settle a demand against the estate of his intestate, a claimant is not bound by a settlement entered into with the administrator.

Hensley v. Pankau's Estate, 97 S.W. 645, 121 Mo.App. 695.

⇐270. Property available for payment.

⇐271. —— In general.

C.C.A.Mo. 1914. A claim for damages for wrongful killing of a decedent is not an asset of his estate subject to the payment of debts.

American Car & Foundry Co. v. Anderson, 211 F. 301, 127 C.C.A. 587.

Mo.App. 1888. If distributees neglect to take possession of lands set apart to them, and if they allow the administrator to collect their rents and disburse them as administrator, such funds, while still in the hands of the administrator, and before the administration is closed, are subject to payment of the debts of creditors of the estate. Especially is this so where the distributees are making no objection to such application of the funds.

Tyler v. Priest, 31 Mo.App. 272.

Mo.App. 1898. Except on an order of the probate court dispensing with administration, the only party entitled to the assets

of the estate of an intestate is the administrator, who holds such assets as the general representative in title of the decedent; but he has not, on that account, any right to apply the assets exempted by law from the payment of debts to that purpose, but holds them in trust for the persons entitled, and must account to them therefor.

Grand Lodge A. O. U. W. v. Dister, 77 Mo.App. 608.

Mo.App. 1901. Demands against a decedent's estate should be paid according to their classification and priority, whether they are paid from the proceeds of personalty or realty. The distinction between legal and equitable assets, and the doctrine of marshaling, are absolute in this state.

Elstroth v. Young, 88 Mo.App. 418.

⇐272. —— Personal and real property.

Mo. 1828. The personal estate of the deceased is the primary fund for the payment of his debts.

Stokes v. O'Fallon, 2 Mo. 32.

Mo. 1875. The administration law subjecting the whole estate, real and personal, to the payment of debts, and dividing the demands into six classes as to order of payment, has entirely superseded the machinery of the common law as to the marshaling of assets in equity and bills for discovery of assets and account.

Titterington v. Hooker, 58 Mo. 593.

Mo. 1887. Lands and tenements are only assets in the hands of an administrator for the payment of the debts of the intestate when the personal property of the estate is insufficient to pay the debts.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

⇐273-277.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐278. Payment before allowance or order.

Mo. 1871. Credit claimed by an administrator, in his final settlement of his intestate's estate, for a premature payment of a claim against the estate, made in advance of any order of payment issued by the probate court, and within one year from the grant of his letters of administration, should be disallowed, although the claim so paid had been passed on, allowed, and classified by the court.

Dullard v. Hardy, 47 Mo. 403.

Mo. 1903. Rev.St.1889, §§ 183–191 (Rev. St.1899, §§ 184–193), provides that claims against the estates of intestates must be exhibited to the administrator, presented to the probate court for allowance, and established by proof. Rev.St.1889, § 223 (Rev.St. 1899, § 224), declares that on every settlement the administrator shall show that every claim for which disbursements have been made has been allowed by the court, omitting the phrase "or shall produce such proof of the demand as would enable the claimant to recover in a suit at law" contained in Rev.St.1879, § 230. *Held*, that an administrator, subsequent to the revision of 1889, could not be allowed a credit for paying claims against the estate which had not been allowed by the probate court.

Langston v. Canterbury, 73 S.W. 151, 173 Mo. 122.

Mo. 1911. If a claim paid by executors was in fact legitimate, and could have been legally probated, the fact that it was not first presented to and allowed by the probate court would not of itself deprive the executors of right to credit for such payment as to heirs and devisees, but creditors might have ground of complaint thereto if there was a deficiency of assets to pay the indebtedness of the estate in full.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo. 1913. Under Rev.St.1889, § 223, providing that on every settlement the administrator shall show that every claim for which disbursements have been made has been allowed by the court, one appointed administrator after taking charge of an estate and paying debts of decedent is not entitled over the objection of the heirs to credit in the final settlement for the debts paid.

Dockery v. Sparks, 157 S.W. 365, 170 Mo.App. 651, affirmed 192 S.W. 86.

Mo. 1917. Under Rev.St.1889, § 223, *held*, that an intermeddler paying claims against an estate was not entitled to credit for the sum so paid, though he was later appointed administrator.

Dockery v. Sparks, 192 S.W. 86.

Mo.App. 1902. Under Rev.St.1899, § 224, providing that upon every settlement an administrator shall show that every claim for which disbursements have been made has been allowed by the court, an administrator may not lawfully pay demands on debts without such an allowance.

Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.

Mo.App. 1903. An administrator has authority to pay dues on building and loan stock belonging to the estate, and pledged to

a bank as security, without any order of court.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.

Mo.App. 1920. In view of Rev.St.1909, §§ 197, 198, 230, V.A.M.S. §§ 464.080, 464.140, 465.090, an administratrix cannot take credit for claims paid unless such claims have been allowed by the court, though the claim is shown to be just and proper and administratrix was ignorant of the law as to such requirements.

Thompson v. Thompson, 217 S.W. 863.

⇐279-280.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐281. Improper payments.

Mo. 1897. An administratrix of a partnership estate, who in good faith pays special tax bills issued against the estate under an ordinance which was afterwards held void, is not chargeable with such payments, although at the time they were made, but unknown to her, a demurrer to a petition in another case, seeking to collect such tax from another estate, had been sustained and was pending in the supreme court on appeal.

Scudder v. Ames, 43 S.W. 659, 142 Mo. 187.

Mo. 1911. If a claim has been properly probated, and it develops after payment that the claim was not in fact a legal demand, the executors should be allowed credit for the payment.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo.App. 1889. A court, having charge of the settlement of estates of deceased persons, is justified in disallowing a payment made by an administrator on a false and fraudulent claim theretofore allowed by the probate court, when it is shown to have been there allowed by the collusive practices and active bad faith of the administrator.

Garr v. Harding, 37 Mo.App. 24.

Mo.App. 1902. An ex parte approval of an improper payment of interest by an administrator on an incumbrance will not prevent the probate court from charging the administrator on final settlement with the loss occasioned thereby.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

Under Rev.St.1899, § 210, V.A.M.S. § 464.130, providing that, if the funds of the estate are insufficient to pay the whole of any one class, such demand shall be paid proportionately, if the administrator pays under such circumstances on any one claim more than its just proportion, without an order of court, he must make good to the estate the excessive payment.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

Mo.App. 1930. Administrator *held* entitled to $500 credit for claim paid nurse attending incompetent for six months before death.

Kiel v. Osterwald, 32 S.W.2d 778.

Mo.App. 1945. An executrix, paying amount secured by trust deed against portion of realty sold by her to pay legacies, as ordered by probate court in approving report of sale, was entitled to credit on final settlement for such amount, but not for interest paid by her on such debt long before such order, in absence of allowance of credit therefor by any court.

Haasaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐282. Failure to make payment.

Mo.App. 1879. Where an administrator improperly expends the assets of the estate in making improvements on the real estate, and in the payment of tax liens thereon, he will be adjudged to pay a claim allowed against the estate, for the payment of which there would have been sufficient assets if he had properly administered the estate.

In re Motier's Estate, 7 Mo.App. 514.

⇐283. Proceedings to enforce payment.

Mo. 1849. Where an estate, from the statements of the administrator, appears to the court to be sufficient to pay all debts, and the court orders that all debts be paid, it is on the implied condition that the administrator has funds; and, where a creditor brings scire facias to compel payment, he must show that the property has been turned into cash.

Polk v. Farar, 12 Mo. 356.

Mo. 1884. Where a creditor has properly presented his claim to an administrator, and the same has been duly allowed, it is no defense to an application by the creditor for an order on the administrator to pay the judgment that the administrator has paid over the funds of the estate to the distributees, and for that reason has no funds on hand.

North v. Priest, 81 Mo. 561.

Mo. 1945. A final order cannot be made requiring an administrator to pay a claim before its allowance becomes final. Mo.R.S.A. § 283, subd. 14, V.A.M.S. § 467.010.

State ex rel. Bostian v. Ridge, 188 S.W. 2d 941, 354 Mo. 145.

Mo.App. 1911. Where, on motion to pay a demand against a decedent's estate, previously allowed and assigned to a designated class, the administrator only tendered the issue of payment, the validity of the judgment allowing and classifying the demand was not in issue, either in the probate court or in the circuit court on appeal.

Dooley v. Ryan's Estate, 134 S.W. 30, 153 Mo.App. 669.

The validity of a judgment of the probate court allowing a claim and assigning it to a class cannot be questioned in the circuit court on appeal from a denial of an order to pay the demand pursuant to the judgment, since the jurisdiction of the circuit court is derivative.

Dooley v. Ryan's Estate, 134 S.W. 30, 153 Mo.App. 669.

Mo.App. 1919. Evidence *held* insufficient to show that funds of plaintiff, which deceased, a real estate agent, had commingled with his own, although they were supposed to be loaned for purpose of constructing a building on a lot for which plaintiff received a deed of trust, came into the hands of the administrators, so as to entitle plaintiff to a preference.

Beck v. Krembs, 213 S.W. 487, 201 Mo. App. 697.

⇐284-287.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

VII. DISTRIBUTION OF ESTATE.

⇐288. Authority and duty to make in general.

Mo. 1887. The law makes it the duty of the executor to inventory all the real as well as the personal property, and, under the order of the probate court, he may lease the real estate, collect the rents, prosecute actions for the recovery of possession, discharge mortgages and other liens, and deliver the property to those entitled thereto, when not needed for the payment of debts. Rev.St. §§ 70, 129, 130, 143.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1894. An administrator pendente lite, appointed under Rev.St.1889, § 13, V.A.M.S. §§ 461.080, 461.090, to administer the estate during the contest of the will, and "account for and pay over all money and property to the executor or regular administrator when qualified to act," cannot assume, because such executor is dead, to make such a final settlement with certain of the distributees as will bind all, unless he is also acting as administrator with the will annexed, and the required notice of such distribution is given to all entitled to it.

Lilly v. Menke, 28 S.W. 643, 994, 126 Mo. 190.

Mo. 1922. An administrator pendente lite has no right to make distribution, but only holds and preserves the estate, and, in emergency under order of the court, may make disbursements for the protection of the estate. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo.App. 1908. Rev.St.1899, art. 11 [Ann. St.1906, p. 423], governs the whole subject of distribution of estates, and under its provisions all estates must be finally distributed.

State ex rel. Brouse v. Burnes, 107 S.W. 1094, 129 Mo.App. 474.

Mo.App. 1935. Under will giving all of decedent's property, including twenty-four shares of stock, to widow for life, it was duty of executor upon final settlement to deliver certificates evidencing the twenty-four shares to widow.

Cameron Trust Co. v. Leibrandt, 83 S.W. 2d 234, 229 Mo.App. 450.

⇐289. Priority of debts to legacies or distributive shares.

C.C.A.Mo. 1944. Under Missouri law, an heir is not entitled to his distributive share of decedent's estate until all debts and charges against estate have been paid and an order of distribution has been entered, and until such time administrator is not liable to suit by an heir.

Milens v. Bostian, 139 F.2d 282.

Mo. 1887. An administrator de bonis non is not entitled to credits for legacies paid, where, when they were paid, he had funds in hand sufficient to pay debts which were left unpaid, although the will provided that such legacies should be paid as soon as possible.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

It is the duty of an administrator to reserve enough money to pay the debts before paying residuary devisees.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1947. Where real estate taxes were a lien against realty of deceased at time of his death, the taxes were properly paid out of personal assets in hands of executors before determination of widow's dower in per-

sonal property, and the executors were entitled to take credit therefor in their final settlement. Mo.R.S.A. §§ 106–108, 111, 112, 141, 181, 224, 306, 323–325, 576, V.A.M.S. §§ 145.090, 462.450–462.470, 463.010, 463.020, 463.170, 464.010, 465.110, 468.010, 469.070, 469.090, 469.130.

In re Poe's Estate, 201 S.W.2d 441, 356 Mo. 276.

Mo. 1949. Where widow elects to take child's share of personalty of deceased husband, she takes subject to debts and costs of administration, as an ordinary distributee of his estate, and her share is subject to its proportionate part of all claims allowed against the husband's estate and all proper charges for costs and expenses incident to the administration thereof in the probate court. Mo.R.S.A. § 323, V.A.M.S. § 469.070.

Wanstrath v. Kappel, 218 S.W.2d 618, 358 Mo. 1077.

Mo.App. 1942. The rights of heirs, legatees, and next of kin are subordinate to those of creditors in the distribution of an estate. Rev.St.1939, § 237, V.A.M.S. § 465.310.

Smith v. Oliver, 157 S.W.2d 558, transferred 148 S.W.2d 795.

⇐290-293.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐294. Liabilities of legatee or distributee to estate.

Mo. 1900. An heir's interest in an estate consists of his distributive or inherited share of the estate, less what he owes the estate, or, in other words, what he owes the estate is to be treated as so much of his interest in the estate already received by him, and, therefore, in the distribution of the property, whether real or personal, he is entitled only to so much thereof as, plus what he has already received, will make his share equal to the share of the other heirs or distributees.

Duffy v. Duffy, 55 S.W. 1002, 155 Mo. 144.

Mo. 1904. An heir's distributive share of the personal estate may be applied by the administrator in payment of a debt due the estate by such heir.

Trabue v. Henderson, 79 S.W. 451, 180 Mo. 616.

Mo. 1933. Where maker of note payable to deceased is legatee, executor may sue on note or treat maker's indebtedness as payment or set-off pro tanto against legacy.

Thompson v. McCune, 63 S.W.2d 41, 333 Mo. 758.

Under right of "retainer," executor may deduct from legacy debt of legatee to estate, though debt is barred by limitation. Rev.St.1929, § 861, V.A.M.S. § 516.110.

Thompson v. McCune, 63 S.W.2d 41, 333 Mo. 758.

In legatee's proceeding to enforce payment of legacy, defense that legatee was indebted to estate in larger amount *held* good, though debt was barred by limitation, especially where will required debts of legatee to estate to be charged against legacy, and where debt in question was not barred by limitations when will was made or testator died. Rev.St.1929, § 861, V.A.M.S. § 516.110.

Thompson v. McCune, 63 S.W.2d 41, 333 Mo. 758.

Mo. 1939. The indebtedness of a legatee or distributee to the estate may be ascertained and offset against his distributive share.

State ex rel. Howe v. Hughes, 123 S.W.2d 105, 343 Mo. 827.

Mo. 1944. Heir's or devisee's indebtedness to decedent's estate, though it arose after decedent's death, gives rise to right of "equitable retainer" in favor of estate against debtor's interest in property of estate, regardless of whether realty passes by descent or by will. Mo.R.S.A. §§ 306, 518, V.A.M.S. §§ 468.010, 468.130.

Old v. Heibel, 178 S.W.2d 351, 352 Mo. 511.

Mo. 1944. Under doctrine of "equitable retainer," notes executed by son which were held by father and mother at time of their deaths, if representing an indebtedness which had not been paid, could be offset against son's distributive share in estates of father and mother, although notes were barred by limitations. Mo.R.S.A. §§ 1013, 1017, V.A.M.S. §§ 516.110, 516.150.

Johnson v. Johnson, 179 S.W.2d 605, 352 Mo. 787.

Mo.App. 1890. An assignment of a distributee's share in an estate passes the distributee's interest subject to the administrator's right to have the same applied to the satisfaction of the distributee's indebtedness to the estate.

Ford v. O'Donnell, 40 Mo.App. 51.

The right exists to deduct from the distributive share of an heir any indebtedness due from the heir to the ancestor at the time of death and remaining unpaid.

Ford v. O'Donnell, 40 Mo.App. 51.

Mo.App. 1898. Decedent's only heirs were her father and her sister, who, therefore, each became entitled to a moiety of

her estate as tenants in common. Decedent had become surety on several obligations of her father, and the greater portion of the estate was consumed in payment of these debts. To secure one of them, decedent had executed a deed of trust on her real estate, and, after her death, the trustee sold the land under the deed. *Held*, that the balance of the proceeds, after payment of the mortgage debt, might be claimed by the administrator, and retained by him to be applied to the indebtedness of the father to the estate, as against his creditors.

Hopkins v. Thompson, 73 Mo.App. 401.

Mo.App. 1920. The right of an administrator to retain from a share due a distributee the amount by which distributee is indebted to the estate exists whether the funds to be distributed were originally personalty or arose from a sale of the real estate.

Traders' Bank v. Dennis' Estate, 221 S. W. 796.

An administrator can retain from a distributee's share the amount paid on a debt of distributee for which deceased was surety, though deceased in her lifetime was not required to pay the amount, so that the debt was a debt due the estate, and not due deceased.

Traders' Bank v. Dennis' Estate, 221 S. W. 796.

Mo.App. 1928. Probate court's order overruling administrator's motion to credit distributee's note to deceased with amount of distributive share *held* not final judgment that note had been paid.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Note due estate from distributee is asset of estate which administrator is charged with duty of collecting.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Demand due estate by distributee may be collected by independent action by administrator, or by deducting amount thereof from distributive share.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Distributee indebted to estate is not entitled to distributive share without first deducting indebtedness therefrom.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Mo.App. 1930. Debt due estate from distributee may either be collected by administrator bringing action thereon, or administrator may deduct amount from distributee's share.

Gorg v. Rutherford, 31 S.W.2d 585.

Mo.App. 1937. It became executors' duty to collect note inventoried as asset of deceased's estate after bank, to which deceased pledged it as collateral security for debt, returned it to executors on discovering that deceased's notes evidencing debt were barred by limitations, either by action at law on collateral note or by charging amount thereof against interest in estate devised by deceased to maker, where will did not release or remit latter's debt to deceased.

Studer v. Harlan, 109 S.W.2d 687, 233 Mo.App. 811.

Mo.App. 1942. The bankruptcy discharge of heir's liability for debt to ancestor does not bar application of principle of equitable retainer. Bankr.Act § 1 et seq., 11 U.S. C.A. § 1 et seq.

Leach v. Armstrong, 156 S.W.2d 959, 236 Mo.App. 382, transferred 149 S.W.2d 865.

Under "equitable retainer" doctrine, debt of heir to ancestor, the liability for which was extinguished by heir's discharge in bankruptcy, was chargeable to heir in an equitable accounting among all the heirs, so as to diminish or extinguish interest which the heir would have otherwise received.

Leach v. Armstrong, 156 S.W.2d 959, 236 Mo.App. 382, transferred 149 S.W.2d 865.

⇐295. Time for delivery or payment of legacy.

C.C.A.Mo. 1944. Under Missouori law, an heir is not entitled to his distributive share of decedent's estate until all debts and charges against estate have been paid and an order of distribution has been entered, and until such time administrator is not liable to suit by an heir.

Milens v. Bostian, 139 F.2d 282.

Mo. 1883. Inasmuch as the statute expressly provides that no administrator shall be compelled to pay legacies or make distribution within two years from the date of his letters, unless bond and security to refund be given by the legatee, an executor had a right to refuse to deliver to a legatee any notes belonging to the estate, under a devise to her of such notes as she should wish to take, up to a certain amount, though the estate was not indebted, since the executor could not know such fact.

Way v. Priest, 13 Mo.App. 555, affirmed 87 Mo. 180.

By Rev.St. §§ 243, 244, an administrator need not make distribution or pay legacies

under any circumstances, except in the case of perishable legacies, within one year.

Way v. Priest, 13 Mo.App. 555, affirmed 87 Mo. 180.

Mo. 1915. Where an executor failed to publish, within 30 days, as required by Rev. St.1909, § 82, V.A.M.S. § 461.440, the fact of issuance of letters of administration to him, a legatee nevertheless had the right, under sections 244 and 245, §§ 465.290, 465.300, to demand payment of his legacy before two years after the belated publication of the notice, about a year and a half after the grant of the letters.

Harter v. Petty, 181 S.W. 39, 266 Mo. 296.

⇐296. Time for making distribution.

Mo. 1929. Five years allowed by testator for administration referred to domiciliary administration, and time ran from date of domiciliary letters.

Ganahl v. Ganahl, 19 S.W.2d 898, 323 Mo. 620.

Mo.App. 1905. On removal of an administrator de bonis non from his office of trustee for certain minor legatees, the facts that the time for proving demands against the testator's estate had expired, and that distribution had been made, indicated that no legal impediment intervened to obstruct the enforcement of the administrator's obligation to pay the trust fund to the new trustee.

Morrow v. Morrow, 87 S.W. 590, 113 Mo. App. 444.

⇐297-298.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐299. Refunding bond or other indemnity.

Mo. 1848. An administrator can be compelled to make distribution by an order of the county court any time after one year from his appointment, without any refunding bond.

State, to Use of Collins, v. Stephenson, 12 Mo. 178.

Mo. 1901. Rev.St.1899, § 239, V.A.M.S. § 465.300, provides that no executor shall be compelled to make distribution within two years from the date of the letters, unless bond be given by the legatees or distributees to refund to pay any debts against the estate; and section 240 § 465.310, enacts that if, on any settlement, it appear that there is sufficient money to satisfy all the demands against the estate, the court shall order the payment of legacies and distribution of shares. *Held*, that section 240 § 465.310, is to be construed in connection with section 239, § 465.300, and a refunding bond must be given where distribution is made within two years after the date of the letters.

In re Pound's Estate, 66 S.W. 273, 166 Mo. 419.

Where an executor, within two years after the date of his letters, without any order of the court, and without requiring any refunding bond, distributed sums to the legatees, and subsequently the court, under Rev. St.1899, § 240, V.A.M.S. § 465.310, made an order for distribution—it appearing that the debts were paid—the executor could not refuse to comply with the order of distribution because no refunding bond had been given by the legatees.

In re Pound's Estate, 66 S.W. 273, 166 Mo. 419.

Mo.App. 1883. Taking of bond as official act. See,

Daudt v. Machens, 13 Mo.App. 592, memorandum.

Payment to heirs of mistakenly supposed decedent as breach. See,

Daudt v. Machens, 13 Mo.App. 592, memorandum.

Mo.App. 1891. In a suit by an executor to foreclose a vendor's lien against the residuary legatee, a defense that there are no debts against the estate, and that the executor has in his hands enough money to pay all legacies except the residuary legacy belonging to defendant, is not available to defendant, unless he first tenders the bond required by Rev.St.1889, § 238, V.A.M.S. § 465.300, providing that executors shall not be required to pay legacies within two years unless refunding bond be given.

Powell v. Palmer, 45 Mo.App. 236.

Mo.App. 1932. Administratrix, waiving refunding bond from distributees when making partial distribution without court order, did so at her own risk. Rev.St.1929, § 237, V.A.M.S. § 465.300.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

⇐300. Delivery of specific legacy.

For cases from other jurisdictions, see other Key Number Digests.

⇐301. Advances by executor or administrator.

Mo. 1880. In a proceeding by an administrator de bonis non to ascertain the amount of property in the hands of the former administrator, whose letters had been revoked, it appeared that the administrator had made

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a settlement with one of the distributees, or had bought the interest of such distributee. *Held*, that the administrator was entitled to be credited with the amount of the interest of such distributee.

Scott v. Crews, 72 Mo. 261.

Mo. 1906. Where under a will it is the duty of the executor to maintain testator's family, a son who acts as executor and supports testator's widow for a certain period from his own means is entitled, on an accounting, to a credit for a reasonable estimate of the cost of such maintenance.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

⇐302. Mode and sufficiency of payment.

⇐303. —— In general.

⇐303 (1). In general.

Mo. 1837. A. died, leaving a widow and six daughters. B. married one of the daughters. C., the widow, administered, and was appointed guardian. B. received of C. one slave, as his share of the estate, after which one of the remaining daughters died, and her share was divided by C. among the four remaining daughters, omitting B., who brought his bill for his wife's proportion of the deceased child's property. The answer alleged that, after B. had received his share, debts came against the estate equal to the whole amount of the deceased child's share, and that C. was directed by the county court to sell a slave to pay the debts, which she did, and was allowed the amount in a settlement with the court. It appeared that after the sale the widow, as guardian, and not as administratrix, presented an account for allowance as of debts paid by her as guardian; but it did not appear that the court allowed the same, nor whether the debts were the debts of the intestate, or of the widow, or of the guardian. *Held*, that B. was entitled to distribution, and that the decree of the court below dismissing the bill must be reversed.

Banks v. McCarty, 5 Mo. 1.

Mo. 1915. Under Rev.St.1909, §§ 247–249, V.A.M.S. §§ 465.320–465.340, distributees *held* not to have elected to take the proceeds of shares in a bank rather than the shares.

State ex rel. Ivie v. Ewing, 174 S.W. 382, 264 Mo. 331.

Mo.App. 1892. An executor bought a bill of exchange from one bank upon another bank, payable to the order of a nonresident distributee, and sent it to her in payment of her share of the estate. The draft was received and deposited for collection, but before it was collected the drawer failed. *Held* not to operate as payment, but to leave the executor still liable.

State ex rel. Crider v. Wagers, 47 Mo. App. 431.

⇐303 (2). To whom payment may be made in general.

Mo.App. 1944. The statute providing for unliquidated and undistributed assets of an estate, remaining at time of final settlement, to be turned over to another by administrator under order of the probate court, intends that a trust of such assets be created and that person to whom the assets are turned over shall become trustee of the trust. Mo.R.S.A. § 240, V.A.M.S. § 465.340.

Memmel v. Thomas, 181 S.W.2d 168, 238 Mo.App. 403.

⇐303 (3). Payment to county or state, or into court.

Mo. 1884. Under Rev.St.1855, p. 167, §§ 16, 17, 19, and page 716, §§ 2, 4, 23, 24, providing for the payment into the state treasury of money belonging to heirs and legatees who fail to claim the same or whose names or whereabouts are unknown, the probate court has jurisdiction of applications to obtain certificates on the state treasury for the payment of the same to the persons entitled thereto, in the cases of unknown heirs or legatees, as well as those who are known, but absent.

In re Bomino's Estate, 83 Mo. 433.

⇐304. —— Legatees or distributees under disability.

Mo. 1884. Testator bequeathed a sum of money to a grandson, providing that the same should be delivered to him by the executor, if the grandson should be of age at the time of testator's decease, and, if not, should be delivered to his guardian. Thereafter one of the other beneficiaries died, and a codicil was added, providing that a sum which had been bequeathed to the deceased beneficiary should be divided among certain other beneficiaries, including the grandson. Testator, while living, requested one of his sons, who was named as executor in the will, to act as guardian of the grandson, and delivered to him the grandson's share of the lapsed legacy, with instructions to hold it until the grandson should attain his majority. Thereafter this son refused to act, either as executor or guardian. *Held*, that the guardian of the grandson, and not the administrator with the will annexed, was entitled to the custody of the grandson's share of the lapsed legacy.

Landis v. Eppstein, 82 Mo. 99.

Mo. 1906. Testator's will gave all his property real and personal, to his wife and one of his sons, and provided that in case

of the death of either of them the property should go to the survivor in trust for themselves, and another son and two daughters, and it was recited that the wife and first-mentioned son should have full power and authority to make distribution of the property among testator's heirs as to them might appear best, and to distribute to those of testator's heirs who were the most in want in the same manner as testator could do were he living. *Held*, that the son who was made executor having paid at the request of one of testator's daughters a sum of money for the purchase of a judgment against her husband, which transaction resulted in material benefit to her and her family, in a suit by the heirs of such daughter for an accounting by the executor, he was entitled to a credit for such payment, irrespective of a contention that at the time the daughter requested the advance, and at the time her interest vested in her under the will, she was a married woman, and that it being prior to the enactment of the married woman's statute, she could not bind her property.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

Mo.App. 1880. Retention of share of minor until appointment of guardian. See,

State v. Crow, 8 Mo.App. 596, memorandum.

⇐305-306.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐307. Effect of payment or distribution.

C.C.A.Mo. 1905. Conveyance by administrators to distributees of their shares of the personalty of an estate not previously authorized, but subsequently approved by the probate court, vests all title and interest therein in the distributees as of the date of the conveyance.

Burnes v. Burnes, 137 F. 781, 70 C.C.A. 357, certiorari denied 26 S.Ct. 746, 199 U.S. 605, 50 L.Ed. 330, affirming 132 F. 485.

Mo.App. 1913. The amount paid to an heir or legatee upon the first annual settlement of an administrator would not be evidence as to what her interest would amount to after final settlement and order of distribution.

Elam v. Bond, 154 S.W. 880, 169 Mo.App. 584.

⇐308. Improper payment in general.

Mo. 1887. An administrator is not entitled to credits for payments to general legatees, where, when they were paid, he had funds in his hands sufficient to pay debts, which by such payment became insufficient, although the will provided that such legacies should be paid as soon as practicable.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo.App. 1903. That an administrator distributed the whole of an estate under order of the probate court before the time for appeal expired is no defense to claims of persons interested in the estate on trial de novo in the circuit court.

Coulter v. Lyda, 76 S.W. 720, 102 Mo. App. 401.

Mo.App. 1940. Where husband renounced will and elected to take one-half of estate under statute, husband was entitled to one-half of estate subject only to the payment of his wife's debts and costs of administration, and executor on final settlement was entitled to credit for payment of bequests, but such bequests could not be considered in determining husband's one-half share. Mo.St.Ann. § 324, p. 210, V.A.M.S. § 464.170.

In re Flynn's Estate, 142 S.W.2d 1069.

Mo.App. 1946. Where administrator or executor delivered assets of estate to person not entitled thereto, under mistaken facts, the representative can recover such funds or property from the person to whom it has been inadvertently delivered.

Hedrick v. Wright, 191 S.W.2d 372, 239 Mo.App. 488.

⇐309. Payment before order or decree.

Mo.App. 1892. An executor is not to be charged because he made a payment without an order of distribution, where the one to whom payment was made would have been entitled to the sum under an order of distribution.

Young v. Thrasher, 48 Mo.App. 327.

Mo.App. 1932. Verbal direction from probate judge did not justify administratrix' partial distribution before estate was fully administered.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Administratrix making partial distribution without court order did so at her own hazard, where another person subsequently established his ownership of estate.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

That administratrix was unaware of any claim on behalf of one subsequently establishing ownership of estate did not protect

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administratrix making partial distribution without court order.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

True owner of estate *held* entitled to receive it from administratrix, and he should not be remitted to remedies, if any, against distributees.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

⇐310-311.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐312. Failure to make payment or distribution.

Mo. 1846. Where an administrator has made final settlement, and the court has ordered the distribution of the money in his hands, the fact that one of the distributees was a minor does not excuse his failure to comply with the order, where the minor had a guardian, since it was his duty to pay the money to the guardian.

Henry v. State, to Use of Russell, 9 Mo. 778.

⇐313. Interest on legacies and distributive shares.

D.C.Mo. 1949. Where the estate of deceased was in the process of distribution and remaindermen filed exceptions to report of accountants, remaindermen were entitled to legal interest on funds of the estate commingled with funds of firm representing the estate in legal matters.

Franz v. Buder, 82 F.Supp. 388, modified Bruder v. Fiske, 174 F.2d 260.

Mo. 1846. Where an order of distribution is made, the administrator will be liable to interest if he improperly detains it afterwards.

Henry v. State, to Use of Russell, 9 Mo. 778.

Mo. 1915. Under Rev.St.1909, § 251, V.A.M.S. § 465.360, an administrator *held* properly charged with interest on funds in his hands for the full time that distribution was delayed.

State ex rel. Ivie v. Ewing, 174 S.W. 382, 264 Mo. 331.

Mo.App. 1898. Under Rev.St.1889, § 5974, V.A.M.S. § 408.040, providing that interest shall be allowed on all money due on any judgment or order of any court from the day of rendering the same until satisfaction, and that all such judgments and orders for money on contracts bearing more than 6 per cent. interest shall bear the same interest borne by such contracts, and other judgments and orders for money shall bear 6 per cent. until satisfaction made, an order of distribution, made in the probate court, bears interest at 6 per cent. from date, without demand by the distributee made on the administrator.

State ex rel. Harrison v. Babb, 77 Mo. App. 277.

Mo.App. 1905. A legatee whose legacy is wrongfully withheld from her after all the debts of the estate have been fully paid and the larger part of other legacies have also been paid, is entitled to recover interest on her legacy from the executor, though a judgment for the legacy, with interest, will be in excess of the balance in the executor's hands at the time of his last settlement.

Berkemeier v. Peters, 86 S.W. 598, 111 Mo.App. 717.

Mo.App. 1913. Where an executor wrongfully refuses to pay a legacy, interest will be allowed thereon from the date of the filing of petition in the probate court requesting such payment.

State ex rel. Wattenbarger v. Lamb, 160 S.W. 55, 174 Mo.App. 360.

⇐314. Proceedings for payment or distribution.

⇐314(1). Nature and form of remedy.

Mo. 1853. An order of distribution by the county court upon an administrator is not a necessary prerequisite to the maintenance of a suit by an heir for her distributive share of the intestate's estate.

State, to Use of Ingram v. Morton, 18 Mo. 53.

A child's share of a decedent's estate payable to decedent's widow under Rev.St. 1909, § 349, V.A.M.S. § 469.070, is obtained by petition to the probate court on final settlement.

Mo. 1912. Howard v. Strode, 146 S.W. 792, 242 Mo. 210, Ann.Cas.1913C, 1057.

Mo. 1912. Howard v. Strode, 146 S.W. 799.

Mo. 1930. Probate proceedings are in nature, but not strictly, proceedings in rem; persons interested being afforded opportunity for hearing.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

⇐314(2). Jurisdiction.

Mo. 1857. By virtue of the act creating probate courts, Sess. Acts 1853, p. 390, the probate court of Ray county has jurisdiction over a motion to compel the payment of specific legacies by an executor.

Darneal v. Reeves' Ex'r, 25 Mo. 295.

Mo. 1896. Testator gave to his widow, whom he made executrix, a life estate, with full control as long as she lived; remainder to certain legatees named. The order of the probate court on final settlement directed "that M., executrix of said estate, and widow of said deceased, and sole legatee" in the will "retain, as her interest under said will, all the money, notes, accounts, and choses in action remaining in her hands in the final settlement of said estate." *Held*, that the probate court had no power to determine what interest the legatee took under the will, and the order was not binding on the remaindermen, though they may have been before the court.

Bramell v. Cole, 37 S.W. 924, 136 Mo. 201, 58 Am.St.Rep. 619.

Mo. 1898. When the time has expired for allowing claims against an estate, and all claims are settled, and the duty of paying legacies or making distribution alone remains, an action for an executor's failure to pay legacies or an administrator's failure to make distribution can be maintained without an order for payment or distribution by the probate court.

Clarke v. Sinks, 46 S.W. 199, 144 Mo. 448.

Mo. 1899. Under Rev.St.1889, § 3397, V.A.M.S. § 481.020, conferring on the probate court jurisdiction of all matters pertaining to probate business, such court, though it has no equitable jurisdiction, can determine the indebtedness of a legatee to testator's estate, and set it off against his legacy or distributive share in the estate.

In re Lietman's Estate, 50 S.W. 307, 149 Mo. 112, 73 Am.St.Rep. 374.

Mo. 1927. Probate court's jurisdiction over application for distribution of decedent's estate did not cease with termination of jurisdiction of special judge. Rev.St.1919, §§ 2563–2566, V.A.M.S. §§ 481.140–481.170.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo. 1939. Generally, an order of distribution of an estate being administered in the probate court is within the jurisdiction of such court.

State ex rel. Howe v. Hughes, 123 S.W.2d 105, 343 Mo. 827.

Mo. 1947. Probate court would have jurisdiction to authorize deduction from distributive share of legatee of amount paid by estate on decedent's written guaranty of brokerage account standing in name of legatee.

In re Jamison's Estate, 202 S.W.2d 879.

Mo.App. 1892. Incidental to proceedings for distribution of testator's estate, a probate court has jurisdiction to construe the will.

Brown v. Stark, 47 Mo.App. 370.

⇐314 (3). Right to distribution and objection thereto.

Mo.App. 1889. In the settlement of a decedent's estate, the probate court has no power to exclude one claiming as distributee under an assignment from a son of deceased, on the ground that, at the time of the death of deceased, the son, as a member of a certain firm, was largely indebted to deceased, and that this indebtedness was, at the time of the distribution, in excess of the son's distributive share.

Ford v. Talmage, 36 Mo.App. 65.

Mo.App. 1931. Probate court is not concerned with claims of legatees' creditors, and should order distribution to legatees entitled thereto regardless of claims of their creditors.

In re Gillis' Estate, 33 S.W.2d 973.

⇐314 (4). Citation or notice.

Mo. 1860. Where an order of distribution was made by the county court in 1828, under Act 1825, § 65, without first giving notice to those interested in the estate, it was *held* to be coram non judice and void.

State, to Use of Morrison's Adm'r, v. St. Gemme's Adm'r, 31 Mo. 230.

Mo. 1894. An order of distribution in the settlement of an estate, made under Rev. St.1889, §§ 242, 243, V.A.M.S. §§ 465.360, 465.370, which provide that notice in writing of such distribution shall be given to each person entitled to it, is void as against distributees who were not so notified.

Lilly v. Menke, 28 S.W. 643, 994, 126 Mo. 190.

Mo. 1901. Under Rev.St.1899, § 243, V.A.M.S. § 465.370, providing that each person entitled to distribution or partition, not applying therefor, shall be notified in writing of such application 10 days before any such order shall be made, an executor is not entitled to a written notice of an application for distribution of funds of an estate in his hands, such statute having reference only to persons entitled to a share in the distribution.

State ex rel. Green v. Henderson, 64 S.W. 138, 164 Mo. 347, 86 Am.St.Rep. 618.

Mo. 1927. Neither administrator making application for distribution of estate nor heir acting as his attorney were entitled to notice of application. Rev.St.1919, p. 241, as

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re-enacted by Laws 1921, p. 115, V.A.M.S. § 465.350.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo. 1930. Order of distribution made at time other than first semiannual or final settlement, and without notice to known distributee, is void as to him. Rev.St.1919, § 241, as re-enacted by Laws 1921, p. 115, V.A.M.S. § 465.350.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

Order of distribution made at time other than first or final settlement, without publication of notice, is void as to unknown distributee. Rev.St.1919, § 79, and § 241, as re-enacted by Laws 1921, p. 115, V.A.M.S. § 461.490.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

Statute relating to service on unknown parties by publication *held* applicable to proceedings for order of distribution sought at time other than first semiannual or final settlement. Rev.St.1919, § 1202, V.A.M.S. § 506.160.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

Where, notwithstanding identity of heirs was doubtful, certain persons were on ex parte hearing without notice awarded legacy to heirs, judgment was void except as to them. Rev.St.1919, §§ 79, 1202, and § 241 as re-enacted by Laws 1921, p. 115, V.A.M.S. §§ 461.490, 465.350, 506.160.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

Mo. 1939. The failure to give claimant against estate notice before making order of partial distribution did not deprive the probate court of jurisdiction to make the order, the statutory requirement of notice applying only to distributees. Mo.St.Ann. § 242, p. 160, V.A.M.S. § 465.350.

State ex rel. Howe v. Hughes, 123 S.W. 2d 105, 343 Mo. 827.

Mo.App. 1902. Under Rev.St.1889, § 242, V.A.M.S. § 465.350, providing that each person entitled to distribution not applying therefor, shall be notified in writing of such application 10 days before any order shall be made, where it appears from the record that none of the distributees had notice of the intended order of distribution, and that defendant, who was not only the executor, but also a distributee, had no knowledge that the order had been made, the order is void, and a motion to quash an execution issued thereon should be sustained.

Baker v. Lumpee, 91 Mo.App. 560.

Mo.App. 1908. Rev.St.1899, § 243, Ann. St.1906, p. 424, V.A.M.S. § 465.350, declares that each person entitled to distribution or partition, not applying therefor, shall be notified in writing of such application 10 days before any such order shall be made, or if such persons do not reside in the state a notice of such application shall be published. *Held*, that notice of an application for distribution was required in all cases, and that the requirement was not limited to cases provided for by sections 241, 242, V.A.M.S. §§ 465.320, 465.330, governing the distribution of personal property, where a division cannot be had among the heirs, or where the property is capable of division in kind.

State ex rel. Brouse v. Burnes, 107 S.W. 1094, 129 Mo.App. 474.

⊂=314(5). Time of proceedings, limitations, and laches.

Mo. 1927. Order of distribution made before final settlement with costs undetermined, *held* premature and void, but valid so far as denying right of heirs to share in property because of decedent's nonresidence.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1913. An action brought against an administrator before final settlement or order of distribution to recover an alleged distributive share was premature.

Elam v. Bond, 154 S.W. 880, 169 Mo.App. 584.

Mo.App. 1942. A probate court has no right to consider and approve a final settlement of decedent's estate and order distribution of assets thereof while claims are pending against estate.

In re Rohde's Estate, 157 S.W.2d 527.

⊂=314(6). Parties.

For cases from other jurisdictions, see other Key Number Digests.

⊂=314(7). Pleading.

Mo. 1878. An application for partial distribution is not an assertion that there may not be a larger sum at that time in the hands of the executor, nor an acceptance of the statements of the executor made in previous annual settlements as correct, nor yet an admission that the amount claimed is the total amount about to be distributed to the applicant at the time of the application.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

Mo.App. 1911. A petition by a legatee to whom testator had made an advancement which the will provided should be deducted from petitioner's share, asking merely that,

when distribution is ordered, petitioner's share shall be set off without charging him with the amount of the advancement, on the ground that he had paid the advancement before testator's death, but failing to allege either that there were any funds in the estate to distribute, or that the estate is in condition for distribution, was premature and unsustainable, either as a petition for distribution or a proceeding in equity.

Brown v. Glover, 138 S.W. 105, 158 Mo. App. 396.

On a petition for the distribution of an estate, the probate court has power to determine whether an advancement required by the will to be charged against a legatee had been paid before testator's death, and was therefore not chargeable against the legatee as a part of his share of the estate.

Brown v. Glover, 138 S.W. 105, 158 Mo. App. 396.

Mo.App. 1913. In a suit to compel an executor to pay a legacy, an answer setting up that plaintiff's ward was not entitled to a legacy from her grandfather's estate which was left to her father, who died before the grandfather, because of the father's indebtedness to the grandfather, is in the nature of a plea in confession and avoidance, and admits the right to the legacy except for the defense.

State ex rel. Wattenbarger v. Lamb, 160 S.W. 55, 174 Mo.App. 360.

⇐314 (8). Evidence.

Mo. 1947. Decedent's estate was prima facie entitled to deduct from distributive share of legatee amount paid by estate under written guaranty by decedent of brokerage account in name of legatee only if, as between deceased and legatee, legatee was primarily liable on such account and debt was one which in equity and good conscience legatee should be required to pay.

In re Jamison's Estate, 202 S.W.2d 879.

Executors had burden of proof to establish right to deduct from distributive share of decedent's sister amount paid by estate on claim based on guaranty by decedent of brokerage account in name of sister.

In re Jamison's Estate, 202 S.W.2d 879.

Mo.App. 1904. On the issue as to whether an heir of an intestate was entitled to receive any further sum from the estate, in view of what he had already received, it was proper to fully show what he and the other heirs had received.

Perdue v. Perdue, 81 S.W. 633, 107 Mo. App. 500.

Mo.App. 1944. In proceeding on exceptions to executor's petition for partial distribution, an admission allegedly made by legatee at meeting of heirs that she owed specified sum to testator, though not of the strongest probative force, was sufficient to make out a prima facie case against legatee and shift the burden of evidence rather than burden of proof to her.

In re Reichelt's Estate, 179 S.W.2d 119.

⇐314 (9). Appointment and proceedings of auditor, commissioners, or distributors.

Mo. 1899. The probate court may modify a report of commissioners appointed under Rev.St.1889, §§ 241–243, V.A.M.S. §§ 465.-330, 465.350, 465.360, to partition personalty among distributees.

Aull v. St. Louis Trust Co., 50 S.W. 289, 149 Mo. 1.

⇐314 (10). Examination and settlement of account, and appraisal.

For cases from other jurisdictions, see other Key Number Digests.

⇐314(11). Hearing and determination.

Mo. 1901. The fact that when an application for distribution was heard and taken under advisement by the court the judge promised to notify the executor's attorney if the order was made, and forgot to do so, will not invalidate the judgment.

State ex rel. Green v. Henderson, 64 S. W. 138, 164 Mo. 347, 86 Am.St.Rep. 618.

Mo. 1939. In ordering distribution of an estate, questions concerning advancements may be litigated and determined and advancements made by deceased to distributees may be adjusted and deducted from their distributive shares so as to equalize the distribution of the estate among those entitled thereto.

State ex rel. Howe v. Hughes, 123 S.W. 2d 105, 343 Mo. 827.

Mo.App. 1891. Rev.St.1889, § 239, V.A. M.S. § 465.310, provides that if, upon any settlement by an executor, it appears that there is sufficient money to satisfy all the demands against the estate, the court shall order the payment of legacies and distribution of shares as in the case of debts. Section 246, § 465.390, provides that, when an order shall be made by the court upon an executor or administrator to pay over money to the distributees and he fails to make such payment, the same proceedings may be had against him and his securities to compel such payment as is authorized in cases where an executor or administrator fails, when ordered, to pay demands against the estate; and section 228, V.A.M.S. § 465.130, provides that, if any executor or administrator fail to pay

any demand allowed, the clerk of the court, on application of the creditor, and being satisfied that such demand has been made, shall issue execution for the amount ordered to be paid. An executor filed the final receipts of the legatees and distributees, the receipt of one of them being signed by an assignee of the distributee and attached to what purported to be a written assignment by the distributee. Thereafter the distributee objected to the filing of the receipt and the discharge of the executor on the ground that the assignment was void, and that the probate court had no jurisdiction to determine its validity. *Held*, that the probate court was confined in its jurisdiction to decreeing distribution and could not order the payment of the distributee's share to the assignee, except by consent, and hence the distributee was prima facie entitled to an execution for her share.

Johnson v. Jones, 47 Mo.App. 237.

⇐314(12). Appeal.

Mo. 1915. Where the widow of a decedent was the administratrix of his estate and claimed as widow one-half of the personal property, she could, as administratrix, appeal from an order of distribution which gave her, as widow, only one-sixth thereof.

Messersmith v. Messersmith, 175 S.W. 914, 264 Mo. 610.

Mo. 1930. Supreme Court's jurisdiction over proceeding for distribution of decedent's estate is appellate.

Wolff v. Rager, 30 S.W.2d 1005, 326 Mo. 222.

Mo. 1939. Creditors may appeal from orders of distribution in probate proceeding including orders of partial distribution. Mo. St.Ann. § 284, p. 177, V.A.M.S. § 467.010.

State ex rel. Howe v. Hughes, 123 S.W.2d 105, 343 Mo. 827.

Mo.App. 1942. The statutory specification, authorizing appeals to circuit courts from probate court orders compelling legatees and distributees to refund, does not authorize appeal by administratrix of decedent's estate from probate court's order setting aside its approval of final settlement and order for distribution of estate. Rev.St.1939, § 283, subd. 12, V.A.M.S. § 467.010.

In re Rohde's Estate, 157 S.W.2d 527.

Mo.App. 1948. Where administratrix de bonis non before filing final settlement was required to give notice to all persons interested in distribution of insured's war risk insurance, ancillary administrator of estate of sole beneficiary of insured's will, on taking appeal from order of distribution of insurance, properly made administratrix alone, and not the individual distributees, party to the appeal. Mo.R.S.A. §§ 229, 230, 283, V.A.M.S. §§ 465.160, 465.170, 467.010, World War Veterans' Act, § 303, 38 U.S.C.A. § 514.

State ex rel. Koontz v. Wells, 210 S.W. 2d 387, 240 Mo.App. 457.

A judgment of circuit court, on appeal from probate court's order of distribution of proceeds of war risk insurance ordering payments of costs of administration and directing payment of remainder to administrator of estate of sole beneficiary under insured's will, was a final order conclusive on all parties interested in insured's estate and should have been complied with by administratrix de bonis non. Mo.R.S.A. § 47; V.A.M.S. § 461.540. World War Veterans' Act, § 303, 38 U.S.C.A. § 514.

State ex rel. Koontz v. Wells, 210 S.W. 2d 387, 240 Mo.App. 457.

⇐314(13). Costs and attorney's fees

For cases from other jurisdictions, see other Key Number Digests.

⇐315. Order or decree for distribution.

⇐315(1). Form and requisites, and relief awarded.

Mo. 1922. Executor, who had paid taxes subsequent to final settlement, was entitled to credit therefor in distribution of funds in his hands.

National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry, 239 S.W. 519, 293 Mo. 399.

Mo. 1927. Order distributing estate of decedent pursuant to application on which hearing was had was not invalidated by failure to notify parties before entry.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1883. By Rev.St. § 103, the probate court is charged with the duty of distributing the personal estate of a decedent, and may make orders for the distribution of personal property in the hands of the administrator. Section 107 requires the administrator to deliver to the widow such property as may be chosen by her under section 107, and the court may make "such orders as the interests of the estate may require"; and by Rev.St. U. S. § 4896 (U.S. Comp.St.1901, p. 3385) every patent is assignable in writing. *Held*, that the probate court, where it made an order of distribution embracing a United States patent, might require the administrator to assign in writing all the interest of the estate of which he was administrator.

Heller v. Leisse, 13 Mo.App. 180.

For references to other topics, see Descriptive-Word Index

Mo.App. 1908. An order for distribution of an estate, made at the final settlement of the executor's account, without notice to distributees, required by Rev.St.1899, § 243, Ann. St.1906, p. 424, V.A.M.S. § 465.350, was coram non judice, and void.

State ex rel. Brouse v. Burnes, 107 S. W. 1094, 129 Mo.App. 474.

Mo.App. 1930. Probate judgment distributing estate and discharging administrator *held* valid.

Gorg v. Rutherford, 31 S.W.2d 585.

That final probate judgment failed to show that administratrix took receipts from heirs and filed them with court *held* not fatal to judgment's validity.

Gorg v. Rutherford, 31 S.W.2d 585.

Order of distribution which is indefinite or which attempts to invest administrator with judicial discretion in determination of distributees and their respective interests is void.

Gorg v. Rutherford, 31 S.W.2d 585.

Probate order that administratrix assign note to heirs as their interest may appear *held* proper, where judgment had theretofore definitely named distributees and their interest as against claim that order did not provide for payment to distributee receiving advancement. Rev.St.1919, § 232, V.A.M.S. § 465.190.

Gorg v. Rutherford, 31 S.W.2d 585.

⇐315 (2). Entry of judgment.

Mo. 1901. The fact that a judgment of distribution of an estate, rendered on the last day of a term, was not actually entered of record until the following term, but, when entered, appeared in its proper place in the court records, and as of the day of rendition, will not render the judgment invalid.

State ex rel. Green v. Henderson, 64 S.W. 138, 164 Mo. 347, 86 Am.St.Rep. 618.

⇐315(3). Amendment and correction.

Mo. 1899. An order of distribution rendered by a probate court may be modified during the term at which it was rendered, though property had been distributed in pursuance of the order, and the distributees had given receipts reciting that the property had been delivered in compliance with the order, and was received in satisfaction thereof.

Aull v. St. Louis Trust Co., 50 S.W. 289, 149 Mo. 1.

⇐315 (4). Opening and vacating.

Mo.App. 1930. To justify setting aside probate judgment at subsequent term for fraud, fraud must be in very procurement of judgment.

Gorg v. Rutherford, 31 S.W.2d 585.

Mo.App. 1931. Probate court has jurisdiction to set aside order of distribution during same term at which it was made.

In re Gillis' Estate, 33 S.W.2d 973.

⇐315 (5). Construction and operation.

Mo. 1872. In a matter of distribution, the judgment of a county court, while unreversed, will protect an innocent purchaser or a stranger buying the property under it.

Tapley v. McPike, 50 Mo. 589.

Mo. 1913. As it is the duty of an executor to pay personal taxes assessed against him on account of the personalty of his testator without an order of probate court, a judgment of a probate court discharging him as executor on ordering final distribution is no bar to a personal action by a state for taxes so assessed.

State ex rel. Rice v. Packard, 157 S.W. 598, 250 Mo. 686.

Mo.App. 1880. Construction and effect of order to pay distributive share of minor. See,

State v. Crow, 8 Mo.App. 596, memorandum.

Mo.App. 1912. Plaintiff's half interest with intestate in a note was not affected by an order of distribution, he not being a party to the proceeding, the distributees being thereby rendered tenants in common with him.

Dewees v. Yost, 143 S.W. 72, 161 Mo. App. 10.

Mo.App. 1916. A final settlement and order of distribution in the probate court has the force of a judgment as to all matters necessarily involved in the settlement.

Einstein v. Strother, 182 S.W. 122.

Mo.App. 1938. While an estate is in the process of administration, the relation of the administrator or executor to those interested in distribution is that of representative, and after an order of distribution is made the relation is that of personal debtor.

Cook v. McCoy, 118 S.W.2d 1043.

Mo.App. 1949. A decree of distribution of an estate confers no new right, but merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to the heirs or legatees, and legal title so given, relates back to date of death.

Williams v. Patterson, 218 S.W.2d 156, 240 Mo.App. 131.

⇐315(6). Conclusiveness and collateral attack.

Mo. 1899. The probate court is a court of record, and an order of distribution made

by it is subject to the usual incidents of such judgment.

Aull v. St. Louis Trust Co., 50 S.W. 289, 149 Mo. 1.

Mo. 1915. Defendants in suits to quiet title and in ejectment, including executor, could not attack collaterally the order of a probate court that the executor sell land to pay a legacy, through which sale plaintiff deraigned title.

Harter v. Petty, 181 S.W. 39, 266 Mo. 296.

In suits to quiet title and in ejectment against an executor by one deraigning title through a legatee under an execution issued on the probate court's order to the executor to pay the legacy with interest, the executor could not collaterally attack the judgment of the probate court by claiming that the item of interest was erroneous.

Harter v. Petty, 181 S.W. 39, 266 Mo. 296.

Mo. 1920. An order of distribution made under Rev.St.1909, § 246, V.A.M.S. § 465.310, becomes final as to the rights of the distributees to their respective shares when no appeal is taken therefrom, under section 289, V.A.M.S. § 467.010, in view of section 251, but where such an order, in addition to making distribution, went further and allowed an administrator 5 per cent. commission on the amounts to be distributed, the order was not a final judgment as to such commission, since by section 229, V.A.M.S. § 465.100, the question of compensation of an administrator is adjudicated at the time settlement is made.

Peper v. Bell, 218 S.W. 438, record of Court of Appeals quashed State ex rel. Peper v. Reynolds, 226 S.W. 550. Opinion of Supreme Court conformed to Peper v. Bell, 229 S.W. 1111.

Mo. 1920. The probate court had authority, under Rev.St.1909, § 246, V.A.M.S. § 465.310, to make a partial order for distribution, and further incidental and statutory authority to allow the administrator distributing the funds not to exceed 5 per cent.; and, where the distributee took no appeal, under section 289, V.A.M.S. § 467.010, within the time allowed, the order became final both as to the distribution and commission.

State ex rel. Peper v. Reynolds, 226 S.W. 550, 286 Mo. 126, quashing record of Court of Appeals Peper v. Bell, 218 S.W. 438, 286 Mo. 126, opinion of Supreme Court conformed to Peper v. Bell, 229 S.W. 1111.

Mo. 1927. Distributee and administrator, who were parties to proceeding to distribute estate, *held* bound in collateral proceeding by finding that decedent was nonresident.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Court conclusively presumes that required notice was given of application for distribution of decedent's estate, where attack is collateral and record is silent. Rev.St. 1919, § 241, as re-enacted by Laws 1921, p. 115, V.A.M.S. § 465.350.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo. 1939. Orders of distribution made by the probate court are so far of the nature of "judgments" that, if not appealed from, they become "final" as to the rights of the distributees and are not subject to collateral attack.

State ex rel. Howe v. Hughes, 123 S.W. 2d 105, 343 Mo. 827.

Mo.App. 1919. Where testator gave wife life estate in land, with right to dispose of one-half of proceeds of sale thereof by will, and gave remainder in other half to his sisters, probate court's order of distribution in administration of wife's estate directing distribution of sisters' as well as wife's half of proceeds of sale of the land, was not res judicata as to rights in sisters' share of proceeds; probate court having no jurisdiction to determine such rights.

McClure v. Baker, 216 S.W. 1018.

Mo.App. 1920. Where defendant, who was appointed administrator of the estate of plaintiff's mother, procured a final order distributing the estate between only two of the heirs, excluding plaintiff who was absent, *held*, that such order of distribution, notwithstanding plaintiff was absent, was void, there being no proceedings for administration on her estate, pursuant to Rev.St.1909, §§ 271–278, V.A.M.S. §§ 466.100—466.170, on the theory that she had been absent for seven years and not heard from.

Flynn v. Stoutimore, 226 S.W. 591.

Mo.App. 1929. Order of distribution directing transfer of specified securities to trustees to pay net income as directed by will *held* conclusive, depriving probate court of jurisdiction to substitute different securities at subsequent term.

In re Boland's Estate, 14 S.W.2d 521.

Mo.App. 1930. Where probate judgment awarded interest to distributee without regard to advancement to distributee, distributee's assignee took interest awarded to distributee, notwithstanding advancement.

Gorg v. Rutherford, 31 S.W.2d 585.

For references to other topics, see Descriptive-Word Index

Probate judgment finally settling and distributing estate and discharging administrator is "final judgment."

Gorg v. Rutherford, 31 S.W.2d 585.

Final probate judgment is impregnable to collateral attack.

Gorg v. Rutherford, 31 S.W.2d 585.

⇐315 (7). Execution and enforcement of decree.

Mo. 1899. Where a probate court has modified an order of distribution, and a distributee refuses to return property received under the original order, the aid of equity may be invoked to enforce the modified order.

Aull v. St. Louis Trust Co., 50 S.W. 289, 149 Mo. 1.

Mo.App. 1883. Enforcement by execution. See,

Adams v. Tracy, 13 Mo.App. 579, memorandum.

Mo.App. 1898. Where, on appeal from the overruling of exceptions to the final settlement of an executor, the circuit court found that the balance due, as shown by his settlement, was the precise amount due to the estate, and made it the basis of an order of distribution, but it appeared that such settlement was on account of the general fund, and there was another settlement on a special fund, of which the court took no notice, except to approve it, for the reason that no exceptions were made to this branch of the settlement, the amount shown to be due by the special settlement could not be deemed to be included in the order of distribution made by the circuit court, so that a discharge of the order of distribution by the payment of the sum found to be due did not relieve the executor from the obligation to pay the sums shown to be due by the special settlement in the probate court.

Schooler's Estate v. Stark, 73 Mo.App. 301.

⇐315 (8). Interest on award.

For cases from other jurisdictions, see other Key Number Digests.

⇐315 (9). Order or decree for partial distribution.

Mo.App. 1930. Denial of application for order nunc pro tunc respecting allowance of advancement item against partnership estate *held* not res judicata against administrator's claim for credit on final settlement.

In re Harr & Harr's Estate, 22 S.W.2d 209, 224 Mo.App. 6.

⇐316-317.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐318. Liability to refund on deficiency of assets.

Mo. 1896. Rev.St.1889, § 247, V.A.M.S. § 465.400, regulating the refunding of legacies for payment of debts of the decedent's estate, and the apportionment thereof by "the court," applies only to the probate court in which the estate is being administered before final settlement of the estate.

Rumsey v. Otis, 34 S.W. 551, 133 Mo. 85.

Mo. 1899. The fact that funds of distributees were paid under an order of the probate court to their creditor, and that he loaned money to the distributees on the strength of the order, does not preclude a modification thereof, during the same term at which it was rendered, requiring him to pay back a part of the money received, where the persons entitled thereto were guilty of no misconduct inducing the making of the loan.

Aull v. St. Louis Trust Co., 50 S.W. 289, 149 Mo. 1.

Mo. 1952. Under statute providing for refund of legacies for payment of debts, application for refund must be filed during course of administration and prior to final settlement of decedent's estate, and anyone adversely affected may oppose application on any ground that would defeat right to order of refund, whether that ground be laches of administrator, invocation of doctrine of estoppel or waiver, or by invoking any other legal or equitable defense which may exist under facts. V.A.M.S. § 465.400.

In re Thomson's Estate, 246 S.W.2d 791, 362 Mo. 1043, 29 A.L.R.2d 1239.

Fact that application for refund of legacies to pay debt of estate of decedent was filed more than fifteen years after establishment of debt and nearly twelve years from affirmance of judgment establishing debt did not alone destroy right of administrator to refund in absence of showing that heirs were prejudiced, put to disadvantage, or were caused to suffer loss or change of position by delay. V.A.M.S. § 465.400.

In re Thomson's Estate, 246 S.W.2d 791, 362 Mo. 1043, 29 A.L.R.2d 1239.

On administrator's application under statute for refund of legacies to pay debt of estate of a decedent, probate court and circuit court on appeal may consider and apply any legal or equitable defense which may be

asserted to defeat right of administrator, including laches of administrator. V.A.M.S. § 465.400.

In re Thomson's Estate, 246 S.W.2d 791, 362 Mo. 1043, 29 A.L.R.2d 1239.

Mo.App. 1908. A sum allowed by the probate court to the administrator as commissions is a "claim against the estate," within the bond given him on his turning over most of the estate to I., the heir, conditioned that I. shall refund to C., the administrator, such sums as may be necessary to pay "any and all claims that may be finally allowed against the estate, together with all necessary costs and expenses in defending the same, so that the said C. shall be held harmless from loss or damage"; it not being necessary that the claim be one of such nature as to require and be capable of defense.

Callaway v. Title Guaranty & Trust Co., 111 S.W. 905, 132 Mo.App. 466.

Recovery on a bond given by the heir to the administrator, on the bulk of the estate being turned over to the heir, conditioned that he would refund to the administrator a sum sufficient to pay any claim that might be allowed against the estate, may be had where a claim of the administrator for commissions was allowed, though when the bond was given it was not expected such an item for commissions would arise, and the administrator had made a void agreement with the heir to act for less than his lawful commissions.

Callaway v. Title Guaranty & Trust Co., 111 S.W. 905, 132 Mo.App. 466.

Mo.App. 1920. Where a claim against a deceased person matures and comes into being as an actionable demand after the deceased's estate has been fully administered and finally settled, and the assets distributed to the heirs or devisees, the claimant can recover from such heirs and devisees, receiving such assets.

City of Springfield v. Clement, 225 S.W. 120, 205 Mo.App. 114, reversed 246 S. W. 175.

The liability of heirs or devisees, receiving assets for claims maturing after final distribution and administration, is not limited to cases arising from express covenants or agreements made by the ancestor in his lifetime, but includes implied contracts, such as contribution between cosureties, statutory liability of decedents as stockholders of insolvent corporations, and the like.

City of Springfield v. Clement, 225 S.W. 120, 205 Mo.App. 114, reversed 246 S. W. 175.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) WHEN AUTHORIZED.

⇐319. Nature of remedy.

Mo.App. 1943. Probate courts have no power to authorize the sale of real estate of a deceased except in cases provided by statute.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

⇐320. Statutory provisions.

Mo.App. 1941. The re-enactment of statute providing for sale of real estate to pay debts of intestate with additional provision for use of proceeds from such sale to pay expenses of administration, when necessary, would have no application in determining administrator's right to thus apply proceeds of sale made prior to such re-enactment. Mo. St.Ann. § 142, p. 88, V.A.M.S. § 463.170.

In re Claus' Estate, 147 S.W.2d 199.

⇐321. For purposes of administration in general.

Mo. 1855. Where an administrator had agreed to convey certain real estate of his intestate for a certain consideration, it was *held* that, the sale not being for the purpose of paying debts, though with the consent of the probate court, he could not sell the interest of minor heirs in such estate, under such circumstances, and that the conveyance of all the estate, except their interest, was not a fulfillment of the agreement to convey.

Bompart's Adm'r v. Lucas, 21 Mo. 598.

An administrator has the power, with the consent of the probate court, to sell the real estate of his intestate for the payment of debts, but has no power to sell the interest which the intestate had in real estate simply for the sake of effecting a compromise of a disputed claim.

Bompart's Adm'r v. Lucas, 21 Mo. 598.

Mo. 1856. Real estate of an intestate cannot be sold to pay expenses of administration.

Farrar v. Dean, 24 Mo. 16.

Mo. 1904. Where the probate court directed the administrator to borrow money to complete a building, and to execute a trust deed on the premises, the work not being of the character contemplated by Rev.St.1899, §§ 100, 101, V.A.M.S. §§ 462.190, 462.200, authorizing the employment of labor to preserve the estate, the trust deed was void, and was properly canceled.

Waldermeyer v. Loebig, 81 S.W. 904, 183 Mo. 363.

Mo.App. 1890. Rev.St.1889, c. 1, nowhere confers on an executor any power to sell the testator's real estate, except for debts, and, when the authority for the sale is derived from the statutory provision, the executor making the sale acts in obedience to the orders of the probate court, and he is subject to its control, and the court possesses in such case full supervisory jurisdiction in all matters respecting the same.

In re Rickenbaugh, 42 Mo.App. 328.

⇐322. For payment of debts.

⇐323. —— Necessity in general.

Mo. 1858. Under Act July 4, 1807 (Ter. Laws, p. 138), providing that if any person dies intestate "and leaves lawful issue," and his personal estate is insufficient to pay his debts, his real estate may be sold therefor, such sale may be made, though he leaves no lawful issue.

Blair v. Marks, 27 Mo. 579.

Mo. 1887. The probate court has no jurisdiction to order the sale of lands in which a married woman had a separate estate, to pay debts contracted during her coverture.

Boston v. Murray, 7 S.W. 273, 94 Mo. 175, following Davis v. Smith, 75 Mo. 219.

Mo. 1888. It is no ground for setting aside an administrator's sale that the only debts due by the estate at the time of the sale were debts secured by mortgage on the land in question.

Day v. Graham, 11 S.W. 55, 97 Mo. 398.

Mo. 1931. Where enough money comes into executor's hands from all sources to pay legal charges against estate, selling remaining portion of corpus of estate, or any nonperishable part thereof, is unauthorized. Rev.St.1929, §§ 112, 113, 223, 225, 226, V.A.M.S. §§ 462.270, 463.010, 463.020, 465.110, 465.-120.

In re Holmes' Estate, 40 S.W.2d 616, 328 Mo. 143.

Mo.App. 1889. A bill in equity by a widow and children of a decedent alleged that defendant, who was decedent's administrator, had sold, for the purpose of paying debts, certain realty which the decedent had mortgaged during his lifetime, and that, though the sale was made subject to the mortgage debt, and the purchasers agreed to pay it, the administrator had afterwards used the general fund of the estate to pay this debt, and was now seeking to sell other land to liquidate the remaining indebtedness. The purchasers from the administrator and other grantees were made parties. *Held* that, if plaintiff's allegations were true, they were entitled to an order restraining the administrator from selling other lands.

Swan v. Thompson, 36 Mo.App. 155.

Mo.App. 1920. Order for sale of real estate for payment of small debt of estate *held* improper, there being cultivated land which could be leased under Rev.St.1909, § 289, V.A.M.S. § 467.010, and notes of decedent's heirs to him, which they, without right, have attempted to divide among themselves, and collection of which should be made or attempted.

Bloyd v. Hartman, 223 S.W. 676.

⇐324. —— Existence and validity of debts.

Under the statute, a probate court possesses no power to allow claims against a decedent's estate which were incurred subsequent to the death of the decedent, and an order for the sale of land belonging to the estate for the payment of such claims is void.

Mo. 1876. Presbyterian Church of United States, Trustees of General Assembly of, v. McElhinney, 61 Mo. 540.

Mo.App. 1882. Ferguson v. Carson, 13 Mo.App. 29.

Mo. 1840. The allowance of claims in a circuit court of another county than that in which administration is had and a sale sought, it not appearing that such court had jurisdiction, is not a basis for a sale.

Hughes v. Griswold, 6 Mo. 245.

Mo. 1876. An order of a probate court, directing the sale of land belonging to a testator for the purpose of paying claims incurred subsequent to the death of the testator, is void, and open to collateral attack.

Presbyterian Church of United States, Trustees of General Assembly of, v. McElhinney, 61 Mo. 540.

Mo.App. 1941. Under statute providing for sale of real estate to pay debts of intestate, as it appeared prior to amendment of 1939, the existence of debts of intestate at time of death was a "condition precedent" to jurisdiction of probate court to order sale of real estate of such deceased person in the event of the insufficiency of personal estate to pay the debts. Mo.St.Ann. §§ 142, 146, 166, pp. 88, 94, 102, V.A.M.S. §§ 463.150, 463.-170, 463.190.

In re Claus' Estate, 147 S.W.2d 199.

Mo.App. 1943. The probate court cannot direct or order a sale of real estate for costs accrued after the administration of an estate begins, and only because it did begin.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

An administrator, who cannot bring about the sale of land of the decedent in probate court by incurring costs of administration therein, may not be permitted to accomplish the same result in any other manner, and he may not so obligate and bind the lands of his decedent in any manner whereby another may be permitted to do what could not otherwise have been legally done.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

⚖325. —— Insufficiency of personalty.

Mo. 1876. Under Wag.St. 97, § 26, providing that, on an application for the sale of real estate of a decedent, the court shall hear the testimony, and may, if necessary, examine all parties on oath touching the application, the creditors have no right to an order for the sale of the real estate where the administrator has committed a devastavit, since they must first exhaust the personalty, and, in pursuit of that end, sue on the bond of the administrator.

Merritt's Estate v. Merritt, 62 Mo. 150.

The creditors of the estate of a decedent are entitled to an order for the sale of real estate, though the administrator has committed a devastavit, where the amount of such devastavit is insufficient to pay the debts, and a sale will be necessary in any event.

Merritt's Estate v. Merritt, 62 Mo. 150.

Mo. 1883. If assets have been wasted by an administrator, creditors must in the first instance look to his bond for a satisfaction of their demands before they can ask for a sale of the realty.

Fenix v. Fenix's Adm'r, 80 Mo. 27.

Mo. 1884. Where administrators, acting in good faith, have expended money in the improvement of land in the possession of the heirs, and by reason of such expenditures have rendered the personal estate insufficient to pay the debts, the heirs cannot, while still holding possession of the land and enjoying the fruits of the expenditures, compel the creditors to resort to an action on the administration bond before subjecting the land to sale for the payment of debts.

Van Bibber v. Julian, 81 Mo. 618.

Mo. 1910. The probate court made an order directing the administrator to turn over the personal estate to the husband of the devisee under decedent's will. The personalty was sufficient to pay decedent's debts, and the order was made under the representation that the husband had paid the debts. The creditors whose claims were unpaid were not in court when the order was made. *Held*, that the unpaid creditors could resort to a sale of real estate to any debts under Wagner's St. c. 2, art. 3, § 10, authorizing a sale of real estate to pay the debts of a decedent on his personal estate being insufficient without first suing the husband receiving the personalty or the bondsmen of the deceased administrator.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

⚖326. For payment of legacies or distribution.

Mo. 1912. While under Rev.St.1909, §§ 147, 148, V.A.M.S. §§ 462.360, 462.370, a sale of incumbered real estate may be made in administration, if such sale will promote the interests of the heirs though there are no general debts, a sale merely to prevent a partition is not justified.

State ex rel. Deems v. Holtcamp, 151 S. W. 153, 245 Mo. 655.

⚖327. Effect of testamentary provisions.

Mo. 1860. A testator, by devising his lands, cannot deprive his executor of the power of sale for the payment of debts.

Shaw v. Nicholay, 30 Mo. 99.

Mo. 1876. It is not within the power of a testator, by the terms of his will, to enlarge the jurisdiction of the probate court, so as to authorize the court to sell real estate belonging to the estate for the payment of claims incurred after testator's death.

Presbyterian Church of United States, Trustees of General Assembly of, v. McElhinney, 61 Mo. 540.

⚖328. Persons entitled to apply.

Mo. 1885. A proceeding for the sale of real estate to pay debts is hostile to the heirs, and it is not their duty to initiate a suit adversely to themselves, the failure to commence which, by the proper party, may result to their benefit; and a person asserting a title which was paramount and superior, occupying a similar position, was not bound to see that administration was closed without delay.

Gunby v. Brown, 86 Mo. 253.

Mo. 1905. The purchaser of the interest of an heir to land owned by a decedent has not such an interest in the land as entitles him to apply for a sale thereof for the payment of debts under Rev.St.1899, § 150, V.A.M.S. § 463.190, providing that such application may be made by any creditor "or other person interested in the estate."

Stark v. Kirchgraber, 85 S.W. 868, 186 Mo. 633, 105 Am.St.Rep. 629.

For references to other topics, see Descriptive-Word Index

Mo.App. 1882. Rev.St. § 150, provides that, if an administrator does not make application for sale of real estate, any creditor, or other person interested in the estate, may make such application, giving 20 days' notice. *Held* that, where one purchased a judgment against an estate for another, the latter was a person interested, within the statute.

Ferguson v. Carson, 13 Mo.App. 29.

⇐329. Property or interests subject to disposal.

⇐329(1). In general.

C.C.A.Mo. 1916. An administrator *held* authorized to sell land to pay judgments of creditors who had obtained a decree setting aside a fraudulent conveyance of the land by decedent in his lifetime.

Byrd v. Hall, 227 F. 537, 142 C.C.A. 169, affirming 211 F. 182.

Mo. 1854. Under a law directing that all right, title, and interest held by decedent at the time of his death should pass to the purchaser under an administrator's sale, an equitable estate in land created by a resulting trust in favor of a decedent was subject to sale.

Valle v. Bryan, 19 Mo. 423.

Mo. 1856. A sale by an administrator under an order of the county court of an equity of redemption in a slave is valid, though the slave is in the possession of the mortgagee, who claims to hold the slave absolutely, and refuses to deliver him up.

Phillips v. Hunter, 22 Mo. 485.

Mo. 1858. Where a conveyance was made in fraud of creditors, a county or probate court has no jurisdiction on the application of the administrator, though made at the instance of creditors, to order a sale of the land for the payment of debts.

George v. Williamson, 26 Mo. 190, 72 Am.Dec. 203.

Mo. 1860. The executor may sell, for the payment of debts, lands devised by the testator, if such sale be necessary for this purpose.

Shaw v. Nicholay, 30 Mo. 99.

Mo. 1872. The probate court has power, on the application of the administrator or a creditor of the estate, to make a general order for the sale of the real estate for the payment of debts, embracing equities of redemption and other interests in the land.

Jackson v. Magruder, 51 Mo. 55.

Mo. 1885. Where the heirs have sold a portion of the land of the estate, the administrator may first resort to the unsold portion, where there is a deficiency of personal estate.

Ferguson's Adm'r v. Carson's Adm'r, 86 Mo. 673, affirming Ferguson v. Carson, 9 Mo.App. 497.

Mo. 1888. One who purchased land at a sheriff's sale without receiving a deed therefor had no such interest in the premises as could be the subject of an administrator's sale.

Blodgett v. Perry, 10 S.W. 891, 97 Mo. 263, 10 Am.St.Rep. 307.

Mo. 1897. The equitable title of a decedent, acquired by full payment of the price of land under a contract of sale, is subject to sale for the payment of his debts.

Howell v. Jump, 41 S.W. 976, 140 Mo. 441.

Mo. 1902. Where a fraudulent conveyance by a decedent is set aside at the suit of his creditors, his administrator has power to sell the land conveyed to pay debts.

St. Francis Mill Co. v. Sugg, 69 S.W. 359, 169 Mo. 130.

Mo. 1910. Under Rev.St.1899, § 2933, Ann.St.1906, p. 1690, V.A.M.S. § 469.010, giving a widow dower in a leasehold estate for a term of 20 years or more as in real estate, the widow's dower in such a leasehold is not subject to sale for her husband's debts, where he died intestate and she made no election of other property in lieu thereof.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Rev.St.1899, § 113, Ann.St.1906, p. 376, V.A.M.S. § 463.020, provides that specific legacies shall not be sold in any case, unless it becomes necessary to pay debts. *Held*, that where a sale of a leasehold for 20 years specifically devised, by the administrator de bonis non, to pay debts, was void, he could not again sell the same after the devisee had conveyed her interest therein, unless it was thereafter needed to pay debts.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Rev.St.1899, § 3172, Ann.St.1906, p. 1807, V.A.M.S. § 513.200, provides that every lease on lands for an unexpired term of three years or more shall be subject to execution and sale as real property. *Held*, that the term "execution" is not limited to a writ issued out of a court to enforce what is generally understood to be a final judgment, nor is the term as used in the statute to be restricted to process to collect the amount due

on a judgment by levy and sale, but embraces all appropriate means for the execution of judgments and decrees, including a probate order for the sale of a leasehold belonging to a decedent's estate, necessary to pay debts by an administrator.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1947. Land which is not a part of a homestead may be sold to satisfy claims against an estate provided that the personalty is insufficient, and, if widow's dower is not set out at such a sale, sale is made subject to the dower interest. Mo.R.S.A. § 141, V.A.M.S. § 463.170.

Brune v. Rathbun, 204 S.W.2d 705.

Mo.App. 1910. Under Rev.St.1899, § 130, Ann.St.1906, p. 379, V.A.M.S. § 462.280, authorizing the probate court, on being satisfied that it is necessary to rent the real estate for payment of debts, to order the administrator to take possession of and rent the same, etc., the probate court may order the administrator of a decedent owning a mine to lease the same for the purpose of obtaining money with which to pay debts; for the word "rent" means a compensation for the use of lands demised, and is treated as a profit issuing out of the land, and rent may be in the form of royalty.

Meeks v. Clear Jack Mining Co., 124 S. W. 1084, 141 Mo.App. 648.

⇐329 (2). Homestead.

The probate court has no authority to order a homestead to be sold, except for antecedent debts, and, before such property is sold for antecedent debts, there should be a finding of that court that the debt for which the property is sold was contracted before the homestead was acquired, and this should appear in the order of sale, so that those interested in the estate, as well as purchasers, may know what is being offered for sale.

Mo. 1883. Kelsay v. Frazier, 78 Mo. 111.

Mo.App. 1884. Daudt v. Harmon, 16 Mo.App. 203.

Mo. 1899. The homestead act of 1875, providing that the homestead, on the death of the head of the family, shall pass to the widow and children, without being subject to payment of his debts, till the youngest child is of age and the widow dies, but his interest in the premises, except the estate of homestead thus continued, shall be subject to the laws relating to payment of debts against the estate of deceased, does not permit of sale of the premises, during the minority of the children or the life of the widow, subject to their homestead rights, for payment of deceased's debts. Such sale cannot be till after termination of their homestead rights.

Broyles v. Cox, 54 S.W. 488, 153 Mo. 242, 77 Am.St.Rep. 714.

Mo. 1900. Under Rev.St.1889, § 5439, V.A.M.S. § 513.495, vesting the homestead in the widow and minor children, without being subject to debts of the deceased, during the life of the widow and minority of the youngest child, and providing that all the interest of the deceased except such homestead shall be subject to payment of debts against the estate, land occupied as a homestead by a widow and minor children cannot be sold by the administrator, subject to the homestead rights, for payment of debts of the deceased.

In re Powell's Estate, 57 S.W. 717, 157 Mo. 151.

Mo. 1901. Rev.St.1879, § 2693, provides that on the death of a husband, leaving a widow and minor children, his homestead shall continue for their benefit, exempt from the husband's debts, until the youngest child shall attain majority and until the widow's death, but that the title and interest of the deceased in the premises, except the estate of homestead, shall be subject to payment of debts against the husband's estate. *Held*, that the fee in the land subject to such homestead may be sold to pay debts, in the course of administration of the husband's estate, during the minority of his children and life of the widow, and there is no ground for postponement of the sale until the death of the widow or majority of the youngest child, since their right of occupancy is of certain duration, and the law does not contemplate that an estate shall be in process of settlement for the lifetime of the widow, or that there should be more than one administration of the estate.

Keene v. Wyatt, 60 S.W. 1037, 160 Mo. 1, affirmed 63 S.W. 116, 160 Mo. 1.

Mo. 1901. Sess.Acts 1875, p. 60, § 1, Rev.St.1879, § 2693, provides that on the death of a husband, leaving a widow and minor children, his homestead shall continue, etc., exempt from his debts, but that his title and interest, except the homestead, shall be subject to sale for payment of debts against his estate. *Held*, that the homestead of a deceased housekeeper or head of a family, which is within the statutory size and limits, can be sold, by an order of the probate court of the proper county, for the payment of debts allowed against the estate of the deceased, subject to the homestead rights of the widow and minor children.

Keene v. Wyatt, 63 S.W. 116, 160 Mo. 1, affirming 60 S.W. 1037, 160 Mo. 1.

Mo. 1913. Under the Homestead Act of 1805 (Rev.St.1899, § 3620), *held*, that a homestead could not be sold in course of administration to pay the debts of the decedent created subsequent to his acquisition of the homestead and not charged thereon in his lifetime.

Armor v. Lewis, 161 S.W. 251, 252 Mo. 568.

Mo. 1917. Where, at time debt was created for which land was sold and administrator's deed was made, land was debtor's homestead, under recorded deed, visibly occupied by him and his family, no title passed by such sale unless debt was legally charged upon land in the debtor's lifetime, as provided by Gen.St.1865, c. 111, § 5, which was then in force.

Lewis v. Barnes, 199 S.W. 212, 272 Mo. 377.

Where debtor, having mortgaged his homestead, died, and his widow and children left state, and mortgagee, instead of foreclosing his lien, got judgment in fifth class against administrator, who secured order for sale of homestead, sale thereunder was void.

Lewis v. Barnes, 199 S.W. 212, 272 Mo. 377.

Mo. 1919. Under the law relating to homesteads, in effect between 1875 and 1895, Rev.St.1879, § 2693, probate court had jurisdiction to sell homestead upon death of owner in 1892 for payment of debts due from the estate.

Wright v. Hetherlin, 209 S.W. 871, 277 Mo. 99.

Mo. 1921. Under Rev.St.1899, § 3620, V.A.M.S. § 513.495, providing that the homestead shall continue for the benefit of the widow and children without being subject to the payment of debts not legally charged thereon in the decedent's lifetime, until the youngest child attains majority, and until the death of the widow, where the probate court attempted to sell the homestead for debts not charged thereon in the decedent's lifetime it had no jurisdiction over the subject-matter, and the sale was an absolute nullity and void upon collateral attack, and the rule has not been changed by the Amendatory Act of 1907, Laws 1907, p. 301, now Rev.St.1909, § 6708, V.A.M.S. § 513.495, except in cases where the heirs of the husband are persons other than his children.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Rev.St.1909, § 6708, V.A.M.S. § 513.495, to provide that when the heirs of the husband are persons other than his children the homestead may be sold for the payment of debts of his estate subject to the rights of the widow, applies only when all of his heirs are persons other than his children, and not when his heirs are his children and a grandchild.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Under Rev.St.1909, § 6708, V.A.M.S. § 513.495, the sale of a homestead for payment of the debts of the deceased owner was not authorized because the owner's widow, daughters, and grandchild left the homestead after his death, and changed their domicile, as the rights of the children and heirs, as remaindermen in fee, became vested upon the death of the decedent, and their title was not forfeited by their failure to continue to reside on the property.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Under Rev.St.1909, § 6708, V.A.M.S. § 513.495, where the owner of a homestead left children and a grandchild as his heirs, the undivided interest of the grandchild could not be sold by the probate court for payment of the decedent's debts.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Mo. 1922. Under Homestead Act 1895, Laws 1895, p. 185, the sale of a homestead during the life of deceased's widow for the payment of his debts is void, and such fact may be invoked even in a collateral proceeding.

Patton v. Buxton, 238 S.W. 118.

Mo. 1923. Decedent's homestead is an estate sui generis, governed wholly by the Homestead Law with respect to rights of creditors and others interested therein, and hence is not subject to sale under general provisions of the law as to administration of decedent's estate.

In re Rombauer's Estate, 256 S.W. 1066.

Mo. 1928. Administrator's sale of homestead for decedent's debts *held* void as against decedent's heirs. Rev.St.1919, § 5857, V.A.M.S. § 513.495.

Johnson v. Adams, 7 S.W.2d 1010.

Mo. 1939. A probate court has no power to order sale of homestead land to pay debts of deceased homesteader contracted subsequent to acquisition of homestead and not made a charge thereon during life of homesteader, even though such sale is to be subject to the homestead of widow and minor children, and a sale under such an order is void. Mo.St.Ann. § 612, p. 4227, V.A.M.S. § 513.495.

Kay v. Politte, 129 SW.2d 863, 344 Mo. 805, 122 A.L.R. 1145.

For later cases see same Topic and Key Number in Pocket Parts

There can be no valid sale of homestead land to pay debts of deceased homesteader, unless such debts were legally charged thereon during his lifetime, for which debts the land may be sold free from rights of widow, children, or heirs. Mo.St. Ann. § 612, p. 4227, V.A.M.S. § 513.495.

Kay v. Politte, 129 S.W.2d 863, 344 Mo. 805, 122 A.L.R. 1145.

Mo. 1947. A homestead, on the death of the owner, is not subject to the claims against the owner's estate and cannot be sold to satisfy the claims, and a sale of the homestead will be void. Mo.R.S.A. § 608, V.A.M.S. § 513.475.

Brune v. Rathbun, 204 S.W.2d 705.

Mo.App. 1903. The estate in remainder in a homestead is subject to sale during administration for the payment of claims against the estate.

Derge v. Hill, 77 S.W. 105, 103 Mo.App. 281.

Mo.App. 1928. In proceeding to sell homestead land to pay widow's allowances, court improperly permitted husband's creditor to intervene and order whole title sold. Rev.St.1919, §§ 107, 5857, 5860, and § 106, as re-enacted by Laws 1921, p. 111, V.A.M.S. § 92.030.

Nettleton Bank v. McGaughey's Estate, 11 S.W.2d 1093, 222 Mo.App. 1084.

Mo.App. 1941. Generally, property occupied as homestead by husband, leaving widow and adult or minor children at his death, cannot be sold to pay his debts even after children attain majority or die or widow dies. Rev.St.1939, § 612, V.A.M.S. § 513.495.

Limb v. Bevins, 155 S.W.2d 508, 236 Mo. App. 556.

Mo.App. 1942. Where decedent left no other assets, a sale of decedent's homestead having a value of less than $1,500, subject to homestead rights, for purpose of procuring funds with which to pay a statutory allowance for support of decedent's widow was authorized by statute, and such sale would convey fee-simple title, subject to widow's homestead rights. Mo.R.S.A. § 106, V.A.M.S. § 462.450.

In re Clute's Estate, 161 S.W.2d 705, 236 Mo.App. 1030.

⇐330-331.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

(B) APPLICATION AND ORDER.

⇐332. Form of proceeding.

Mo. 1888. Rev.St. § 170, provides that if on the settlement of the administrator's accounts it appear that the personal estate is not sufficient to pay debts the court may make such order as it thinks necessary for the sale of the real estate. Section 222 requires the administrator, at the first term of the probate court after the end of one year from the date of his letters, to exhibit his accounts for settlement, and to make a like exhibit every year thereafter. *Held* that, on the filing of the annual settlement at the proper time, the court may during the term order a sale of the realty without petition and order to show cause.

Day v. Graham, 11 S.W. 55, 97 Mo. 398.

Mo. 1909. A petition by the widow and adult children and the guardian of minor children, which alleges decedent's death, his indebtedness, the widow's inability to manage, and pay the taxes on, the homestead, and which prays for the sale of a part of the homestead to pay the indebtedness, etc., is a petition for the sale of real estate to pay debts of decedent under Rev.St.1879, §§ 143–146, Rev.St.1899, §§ 143–146, Ann.St.1906, pp. 383, 384, V.A.M.S. §§ 462.360, 462.370, 463.170, authorizing the sale of land to pay debts.

Scott v. Royston, 123 S.W. 454, 223 Mo. 568.

Mo. 1910. Rev.St.1899, § 3172, Ann.St. 1906, p. 1807, V.A.M.S. § 513.200, provides that every lease of lands for an unexpired term of three years or more shall be subject to execution and sale as real property. Section 2933 (page 1690, V.A.M.S. § 469.010, gives a widow dower in leasehold estates of her husband for a term of 20 years or more to be assigned as in real estate, and for a term of less than 20 years to be assigned as personal property. *Held*, that such sections were not in conflict, but supplemented each other, and section 3172, V.A.M.S. § 513.200, being sufficiently broad to include all "judicial sales," which embraces a sale of real estate under an order of the probate court, where a leasehold for an unexpired term of three years or more not assigned to a widow as dower is required to be sold for the lessee's debts, it must be sold in the manner provided by sections 147, 148 (page 386), V.A.M.S. §§ 463.180, 463.250, for sales of real estate, which can only be made on the administrator's petition, accompanied by an inventory of the decedent's real estate and remaining personal property and a list of the debts unpaid, and after notice to those interested.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

For references to other topics, see Descriptive-Word Index

⇐333. Jurisdiction.

The "probate and common pleas court" of Jackson county is none the less a probate court because it has common pleas business added to its probate business; and an administrator's sale of land in Jackson county, made while such court was in session for the transaction of probate business, is valid, under the statute requiring such sale to be made during the session of the circuit, probate, or county court.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1903. Where, on an application to the court of common pleas in which the administration of testator's estate was pending for the sale of land to pay debts, the judge of the court was disqualified, and thereupon certified the cause to the circuit court, as authorized by Rev.St.1899, § 1760, V.A.M.S. § 481.130, such court had jurisdiction to order a sale of the land in question.

Meddis v. Kenney, 75 S.W. 633, 176 Mo. 200, 98 Am.St.Rep. 496.

Mo. 1912. Probate court acquiring jurisdiction, refusing to approve administrator's sale of real estate, may at subsequent term order sale without notice.

Brown v. Marshall, 145 S.W. 810, 241 Mo. 707.

Mo. 1914. Where order for administrator's sale of real property had been duly published and once renewed, entry of order of sale at subsequent term amounted to second renewal of order of sale, and no application or order of publication was necessary.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

Mo. 1922. In view of V.A.M.S. Const. art. 6, § 34, and Rev.St.1919, §§ 129 and 141, V.A.M.S. §§ 462.280, 463.170, probate courts have jurisdiction to order sale or lease of realty to pay debts.

In re Dildine's Estate, 239 S.W. 112, 293 Mo. 393.

Mo. 1923. Under Rev.St.1919, §§ 5853, 5854, 5857, 5863, V.A.M.S. §§ 513.475, 513.480, 513.495, 513.525, the probate court has no jurisdiction to order the sale of land of decedent who died leaving a widow and child, where such land includes the homestead, and such homestead cannot be severed from the residue of the land without great injury thereto; the jurisdiction in such case being in the circuit court under section 5863, § 513.525.

In re Rombauer Estate, 256 S.W. 1066.

Mo.App. 1915. The circuit court has no original jurisdiction over a mere application for an order to sell a decedent's land to pay debts.

Goellner v. Goellner, 178 S.W. 229.

Mo.App. 1940. Where partition suit pending in circuit court at time of filing of petition for sale of realty to pay debts in probate court was dismissed, and one of defendants in original partition suit afterwards filed another partition suit subsequent to filing of petition in probate court, probate court had jurisdiction. Mo.St.Ann. § 142, p. 88, V.A.M.S. § 463.180.

In re Adams' Estate, 139 S.W.2d 1037.

⇐334. Time for application.

Mo. 1885. A delay of an administrator of 12 or 13 years before applying for an order of sale to pay debts, when there was but a single demand, and no personal property to administer upon, was inexcusable.

Gunby v. Brown, 86 Mo. 253.

A proceeding to sell real estate is but a step to be taken in the course of the proper administration of the estate, and, there being no statutes prescribing the time within which the administrator must procure an order to sell to pay debts, it must be done within a reasonable time.

Gunby v. Brown, 86 Mo. 253.

A delay of 11 years after decedent's death before applying for an order to sell his land to pay his debts does not render the sale void so as to subject it to collateral attack, where the delay was largely caused by a pending suit to cancel a deed as a cloud on decedent's title.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1905. Where the first administration on an estate was by a son of deceased, who made no application to sell the real estate for payment of debts, and after his removal and the placing of the estate in the hands of the public administrator the widow immediately proceeded to have the land set off as a homestead, which was done, and it remained in her possession up to the time of her death, though an application by the public administrator to sell the land subject to the homestead was not made until 11 years after decedent's death, an heir could not complain of the delay in the application, in an ejectment suit brought 25 years there after.

Robbins v. Boulware, 88 S.W. 674, 190 Mo. 33, 109 Am.St.Rep. 746.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1908. Under the express provisions of Rev.St.1899, § 117, V.A.M.S. § 463.130, an order permitting an administrator to sell personal assets by private sale may be obtained in vacation.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo.App. 1889. Under the statute relative to the settlement of estates, an application by an administrator for leave to sell realty to pay debts is prima facie too late, when made after the expiration of two years.

Swan v. Thompson, 36 Mo.App. 155.

Mo.App. 1890. Where letters of administration were granted in 1875, an order for the sale of real estate to pay debts made in 1877, and a final settlement filed and approved in 1880, an action to set aside such settlement and have a sale of decedent's homestead for payment of debts, because of a mistake of law as to the right to sell such homestead, begun in 1887, of which mistake plaintiff knew in 1885, cannot be maintained, because a proceeding for sale of a decedent's land must be brought within a reasonable time.

Weinerth v. Trendley, 39 Mo.App. 333.

Mo.App. 1896. That 12 years had elapsed from the time of the appointment of an administrator before the making of an application for the sale of land is not such a delay as will bar the right to have the land sold, where it was shown that the heirs consisted of a widow and four minor children, that no purchaser at a reasonable price could be found, and that it was thought best by the administrator and the probate court to postpone the sale until such a time as it could be had to advantage.

Barlow v. Clark, 67 Mo.App. 340.

Mo.App. 1911. In the absence of administration on the estate of an owner of land, who died in 1863, his debts would not be barred by Laws 1909, p. 102, § 1, Rev.St. 1909, § 188, V.A.M.S. § 463.430, prescribing a limitation of ten years for enforcing debts by sale of the lands of a debtor who "shall" die, where there is no administration, the section being wholly prospective; nor, under section 2 of the same act, Rev.St.1909, § 189, V.A.M.S. § 463.430, providing that, as to such persons who "have died" more than ten years before the act took effect, the limitation against enforcing his debts by sale of his lands should be two years from the taking effect of the act, would the defense of limitations be available in a suit begun in June, 1910.

Austin v. Shipman, 141 S.W. 425, 160 Mo.App. 206.

⇐335. Parties.

For cases from other jurisdictions, see other Key Number Digests.

⇐336. Petition or other application.

Mo. 1857. A petition to a probate court by an administrator for the sale of lands for the payment of debts should not be dismissed for the want of an averment that the lands mentioned in the petition belonged to the intestate at the time of his death.

Trent's Adm'r v. Trent, 24 Mo. 307.

Mo. 1875. On an application for the sale of land of an intestate, the court sustained objections thereto, and refused to order a sale. At a subsequent term an amended petition, unaccompanied by accounts, lists, inventories, or appraisements, was filed. No notice was given by the administrator of the filing, but the widow and heirs appeared by attorney, and an order was made directing the sale at private sale. *Held*, that the mode of proceeding adopted by the administrator and sanctioned by the court, though irregular, did not render the sale void.

Garner v. Tucker, 61 Mo. 427.

Mo. 1877. Under Wag.St. pp. 93, 94, §§ 2, 3, which provide that if any person die, having purchased real estate, and shall not have completed the payment, nor devised such estate, nor provided for the payment by will, and the completion of such payment would be beneficial to the estate, and not injurious to creditors, the executor or administrator, by order of the court, may complete such payment out of the assets in his hands, and such estate shall be disposed of as other real estate, and that, if the court believes that after the payment of debts there will not be sufficient assets to pay for such real estate, the court may order the executor or administrator to sell all the right, title, and interest of the deceased therein, a sale of real estate by an administrator, the purchase price of which had not been paid by decedent, made on due notice and report, in accordance with an order of the court, is not invalid by reason of the fact that it was made without a petition and appraisement.

Garrett v. Bicknell, 64 Mo. 404.

Mo. 1893. Under Rev.St.1879, § 146, a petition by an administrator for an order of sale need not describe the land to be sold, as the description of the land may be obtained from the exhibits required by section 147 to be filed with the petition.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

Mo. 1903. A deed based on a sale by an administrator on a petition to the probate court that does not describe the land, and

on an order in response to such petition, also failing to describe the land, is void.

Roberts v. Thomason, 74 S.W. 624, 174 Mo. 378.

Mo. 1905. Though the statute requires that a petition for the sale of lands of a decedent for payment of debts be verified by affidavit, the absence thereof is a mere irregularity, and, the parties interested being in court by due process, the irregularity does not render the proceedings void, or subject to an attack collaterally.

Robbins v. Boulware, 88 S.W. 674, 190 Mo. 33, 109 Am.St.Rep. 746.

Mo. 1910. The filing in the probate court of a petition by an administrator for the sale of real estate to pay debts gives the court jurisdiction over the real estate, and the omission of the administrator to file with the petition the inventory, appraisement, lists and accounts of the estate, as required by the statute, does not deprive the court of jurisdiction nor render the sale void.

Smith v. Black, 132 S.W. 1129, 231 Mo. 681.

Mo.App. 1886. Failure of a petition for the sale of lands of a decedent to state in direct terms that there were no personal assets in the hands of the administrator out of which to pay plaintiff's demands should not be permitted to work a reversal of an order of sale, where the fact in question was stated inferentially in the petition, was conclusively proved, and was not disputed.

Brown v. Woody, 22 Mo.App. 253.

⇐337. Citation or notice.

Mo. 1852. Under Rev.St.1845, art. 3, § 24, requiring notice of proceedings by an administrator to procure an order for the sale of land to be given to "persons interested in an estate," the word "estate" does not mean the real estate to be sold, but the entire estate of the deceased to be administered on; hence a stranger, who claims the land, is not entitled to notice.

Shields v. Ashley's Adm'r, 16 Mo. 471.

Mo. 1854. A sale appearing upon the record to have been made under the section which provides for the payment of debts, Rev.Code 1835, art. 3, § 8, and which is void for want of the notice required by that section, cannot be sustained as having been made under certain other sections, which provide for a sale for other ends, and which require no notice.

Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Mo. 1884. A sale of land by an administrator is not valid, where no petition was filed and no notice given of an intended application for an order, unless it appears on settlement of the administrator's accounts, that the personal estate is insufficient to pay the debts, in which case the court may make the order sua sponte.

Teverbaugh v. Hawkins, 82 Mo. 180.

Mo. 1891. Where no order of publication of notice of application for sale of lands of one deceased, for payment of his debts, is made as required by statute, the probate court acquires no jurisdiction to order such sale; and a circuit court has no power, on appeal, to direct the probate court to make an order of sale; and a sale under an order so made conveys no title.

Cunningham v. Anderson, 17 S.W. 972, 107 Mo. 371, 28 Am.St.Rep. 417.

The sale of a decedent's land for the payment of debts is not void because the order to show cause, and the notice given by publication pursuant thereto, are entitled "In the matter of the estate of W. M. Macey, deceased," instead of "William M. Macey," where it appears that the estate was as well known by the one designation as the other, and that no interested party was misled thereby.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1894. A notice by an administrator of an intention to apply for an order to sell his decedent's lands for the payment of debts may be used by his successor as administrator of the same estate, in case the first administrator fails to effect a sale.

Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1896. An order for the sale of decedent's lands, which was void for want of notice to the heirs, required by Rev.St.1889, § 147, V.A.M.S. § 463.250, cannot be cured by a subsequent notice.

Hutchison v. Shelley, 34 S.W. 838, 133 Mo. 400.

Under Rev.St.1889, § 147, V.A.M.S. § 463.250, providing that, when a petition is filed for the sale of a decedent's land, notice must be given to the heirs, by publication for four weeks in some newspaper, or by handbills posted in public places, an order of sale not on an annual accounting made without such notice, and on the same day that the petition was filed, is void.

Hutchison v. Shelley, 34 S.W. 838, 133 Mo. 400.

Mo. 1898. Under Gen.St.1865, p. 498, § 25, providing that a notice to show cause

why a decedent's land should not be sold shall be published four weeks before the term of court at which the order of sale will be made, a notice published September 8th for the first time is not sufficient to give the court jurisdiction at a term beginning October 2d.

Young v. Downey, 46 S.W. 1086, 145 Mo. 250, 68 Am.St.Rep. 568.

When it affirmatively appears from the records in proceedings for the sale of land by an administrator that it is impossible that the statutory notice could have been given, the order of sale must be held invalid.

Young v. Downey, 46 S.W. 1086, 145 Mo. 250, 68 Am.St.Rep. 568.

Mo. 1899. Gen.St.1865, p. 498, § 25, requiring that a notice to show cause why a decedent's land should not be sold to pay debts shall be published four weeks before the term of court at which the order of sale is to be made, is not complied with, where the first publication is made less than 28 days prior to the first day of the term, though four insertions in a weekly newspaper are made before said day, and a sale made thereon is void.

Young v. Downey, 51 S.W. 751, 150 Mo. 317.

Mo. 1905. Rev.St.1879, § 148, requiring notice of proceedings for the sale of land of a decedent for payment of debts to be published four weeks in some newspaper before the term of court, does not require the publication for the four weeks immediately preceding the term of court.

Robbins v. Boulware, 88 S.W. 674, 190 Mo. 33, 109 Am.St.Rep. 746.

Mo. 1906. Rev.St.1899, § 148, V.A.M.S. § 463.250, provides that on filing of a petition for sale of real estate of a decedent, the court shall order all persons interested in the estate to be notified thereof, and that such notice be published; provided, that where the heirs or "devisees" are residents of the county, notice shall be served on each one. Section 4160, V.A.M.S. §§ 1.020 et seq., 80.010, provides that, in construing statutes, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import. *Held*, that the word "devisees" does not include legatees.

Desloge v. Tucker, 94 S.W. 283, 196 Mo. 587.

The notice to heirs and devisees and those interested in the estate of a petition for the sale of a decedent's real estate, as required by Rev.St.1899, § 148, V.A.M.S. § 463.250, is jurisdictional.

Desloge v. Tucker, 94 S.W. 283, 196 Mo. 587.

Mo. 1910. Under Wagner's St. c. 2, art. 3, § 25, requiring the publication for four weeks in some newspaper in the county of an application for an order for the sale of real estate of a decedent to pay debts, but without requiring the court to designate the newspaper, a publication of a notice for the required time in one newspaper of the county is sufficient as against collateral attack, though the court, in the order, designated no newspaper, especially where the court accepted the publication as a compliance with its order.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Mo. 1911. Where land is to be sold by an administratrix to pay debts, Rev.St.1909, § 152, V.A.M.S. § 463.250, confers on all heirs living in the county an absolute right to personal notice of the petition.

Thompson v. Pinnell, 141 S.W. 605, 237 Mo. 545.

Mo. 1912. Under Rev.St.1879, § 168, a probate court acquiring jurisdiction, refusing to approve an administrator's sale of real estate, may at a subsequent term order a sale without notice to the persons interested.

Brown v. Marshall, 145 S.W. 810, 241 Mo. 707.

Mo. 1912. An administrator selling incumbered real estate to pay his own unprobated claim or the debts due to incumbrancers must proceed under Rev.St.1909, §§ 150, 151, V.A.M.S. §§ 463.170, 463.180, by petition accompanied by his account and inventory and a list of unpaid debts, and must give the notice required by section 152.

State ex rel. Deems v. Holtcamp, 151 S. W. 153, 245 Mo. 655.

Though Rev.St.1909, §§ 147, 148, V.A. M.S. §§ 462.360, 462.370, require no notice, such notice is necessary.

State ex rel. Deems v. Holtcamp, 151 S.W. 153, 245 Mo. 655.

Mo. 1913. An order for an administrator's sale to pay debts of decedent is void if personal notice was not served on resident heirs as required by Rev.St.1909, § 152, V.A.M.S. § 463.250; notice merely by publication being insufficient.

Jackson v. Johnson, 154 S.W. 759, 248 Mo. 680.

Mo. 1914. Where an order for the administrator's sale of real property had been

duly published and once renewed, the entry of an order of sale at a subsequent term which recited that the previous order of publication had been duly published amounted to a second renewal of the order of sale, and no application or order of publication was necessary.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

Mo.App. 1903. Though the probate court had jurisdiction of the subject-matter of a proceeding to compel an administrator to sell real estate to satisfy a judgment lien, it was not authorized to act until the proper parties were legally notified; Rev.St.1899, § 544, V.A.M.S. § 507.030, providing that parties who are united in interest in law or equity actions must be joined as plaintiffs or defendants.

Hill v. Taylor, 74 S.W. 9, 99 Mo.App. 524.

Mo.App. 1918. Rev.St.1909, § 152, V.A.M.S. § 463.250, requiring notice to "all persons interested in the estate" of a decedent when, the personal estate being insufficient to pay debts and legacies, the probate court is petitioned for an order directing sale of land, requires notice to creditors as well as heirs.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

Probate court's order of relinquishment of the interest of intestate in a land contract was void, where no notice of application therefor was given creditors of the estate.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

⇐338. Objections and exceptions.

Mo. 1846. A decision of a county court on a petition to sell land of an estate for the payment of debts is not res judicata on a subsequent petition.

Callahan v. Griswold, 9 Mo. 784.

Mo. 1852. A person claiming paramount title to a decedent's real estate has no right to appear in proceedings brought by the administrator and resist an order for sale of the property to pay decedent's debts, since such proceeding cannot affect claimant's interest.

Shields v. Ashley's Adm'r, 16 Mo. 471.

Mo. 1857. On application by an administrator to sell real estate for the payment of debts, if the court finds that the allegations that certain judgments and executions are liens upon the property are not true, this is no ground for refusing the order, as the question of lien upon such estate can only be material in considering the order in which the debts shall be paid.

Trent's Adm'r v. Trent, 24 Mo. 307.

Mo. 1878. Though the affidavit to a petition by an administrator for an order to sell real estate does not literally comply with the law, it will not render the proceedings void.

Wilkerson v. Allen, 67 Mo. 502.

Mo.App. 1886. Where notice was given to an administrator to file his accounts, lists, and inventories, as required by Rev.St. § 150, but he failed to do so, an objection on his part thereafter that no order of sale of land could be made because such accounts, etc., had not been filed, was not well taken.

Brown v. Woody, 22 Mo.App. 253.

Mo.App. 1909. While the probate court on an application under Rev.St.1899, § 146, Ann.St.1906, p. 384, V.A.M.S. § 463.170, and the following sections relating to the sale of land to pay debts for an order to sell property claimed to belong to the estate, could not adjudicate title to the property, it could determine whether a dispute as to title was a sufficient cloud to cause the property to be sold at a sacrifice and refuse the application if it so decided, and, where others claimed title to the property sought to be sold, under a deed which, on its face, tended strongly to support their claim, application was properly denied.

In re Wood's Estate, 120 S.W. 635, 138 Mo.App. 258.

⇐339. Hearing of application in general.

Mo.App. 1885. The statute, providing that, when a petition for the sale of real estate, together with the accounts, lists, and inventories, shall be filed in the probate court, the court shall order that all persons interested be notified, and, upon proof of publication being made, the court shall hear the testimony and make an order for the sale of the real estate, does not contemplate an investigation of the accounts and an inquiry as to whether there is a deficiency of personal property, until after proof of the order of publication and all interested persons are before the court, and it is improper for the court, on a preliminary application for an order of publication, to examine into the merits of the application, and to refuse to make the order.

Ferguson's Adm'r v. Carson's Adm'r, 86 Mo. 673, affirming Ferguson v. Carson, 9 Mo.App. 497.

Mo.App. 1940. Burden was on executors to show that personal assets were insufficient to pay allowed demand after payment of

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costs and expenses of administration to secure order of probate court for sale of realty. Mo.St.Ann. § 142, p. 88, V.A.M.S. § 463.180.

In re Adams' Estate, 139 S.W.2d 1037.

Evidence failed to establish that personal assets of estate were insufficient to pay allowed demand after payment of costs and expenses of administration, so as to entitle executors to an order of probate court for sale of realty. Mo.St.Ann. § 142, p. 88, V.A.M.S. § 463.180.

In re Adams' Estate, 139 S.W.2d 1037.

⇐340. Proof and contest of claims.

Mo. 1846. In proceedings by an administrator for leave to sell land to pay debts which have been reduced to judgment, the heirs may show fraud on the part of the administrator in suffering the judgment.

Callahan v. Griswold, 9 Mo. 784.

⇐341. Determination as to sufficiency of personalty.

The filing of an inventory and appraisement of the personalty and a schedule of the debts, under Rev.Code 1835, p. 52, art. 3, §§ 8, 9, is not essential to the jurisdiction of the court to order a sale of realty for the payment of debts.

Mo. 1853. Overton v. Johnson, 17 Mo. 442.

Mo. 1854. Mount v. Valle, 19 Mo. 621.

Mo. 1876. Grayson v. Weddle, 63 Mo. 523.

Mo. 1876. A creditor of an intestate is not required to exhibit to the court the true condition of the estate, as to personal and real property and debts, in order to secure an order for the sale of the realty, but he need only notify the administrator of the estate, whose duty it is to make the showing.

Grayson v. Weddle, 63 Mo. 523.

Mo. 1886. The application of an administrator for an order to sell real estate was made in accordance with the requirements of Gen.St.1865, c. 122, § 10, and accompanied by the account of his administration, and containing the lists and inventories, as required by section 22 of the same statute, and praying for a sale of the real estate. On presentation of the petition, accounts, etc., the court found to its satisfaction that the personal estate was insufficient to pay the debts, and ordered the sale of the real estate. *Held*, that the sufficiency of the personal estate to discharge the debts was judicially ascertained and determined by the court in conformity with the requirements of law.

Camden v. Plain, 4 S.W. 86, 91 Mo. 117.

⇐342-343.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐344. Claims to property.

Mo. 1852. Proceedings by an administrator to obtain an order to sell real estate are not proceedings in rem, so that a stranger who claims the land about to be sold can come in and object to the proceedings.

Shields v. Ashley's Adm'r, 16 Mo. 471.

⇐345. Order or decree.

⇐346. —— Requisites in general.

Mo. 1910. Rev.St.1899, § 117, Ann.St. 1906, p. 376, V.A.M.S. § 463.130, provides that, if any executor or administrator applies to sell personal property of the deceased at private sale, the court, if satisfied that such sale will not be prejudicial to the parties in interest, may order such sale and "prescribe the terms thereof." *Held*, that the direction that the court shall prescribe the terms of such sale is an essential and mandatory part of the statute, and hence an order directing the sale of a leasehold belonging to the estate, without prescribing the terms of such sale, was void, as was also the sale held thereunder.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

An order directing an administrator's sale of a leasehold, but failing to authorize a private sale, at which the leasehold was sold, was not cured, so as to validate such sale, by the fact that the petition asked for a private sale.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1910. Wag.St.1872, p. 96, § 25, providing that when the petition, accounts, lists, and inventories shall be filed, the court shall order that all persons interested in the estate shall be notified thereof, and that, unless the contrary be shown on the first day of the next term, an order will be made for the sale of real estate to pay debts, does not require the court to find and state in its judgment the amount of the debts.

Rhodes v. Bell, 130 S.W. 465, 230 Mo. 138.

Mo. 1914. Where a deed to a portion of the premises had been given under a prior order of sale, a subsequent order for the sale of the entire tract which made no reference to the former sale is good as to the land which had not been previously sold.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

For references to other topics, see Descriptive-Word Index

⇐347. —— Description of property.

Mo. 1872. Where the petition of an administrator prayed for the sale of certain lands, and the appraisement set out the number, description, and location of the land, and the order of sale referred to and was based on the petition and description, the sale was not void because the order did not specify and set out the land to be sold.

Adams v. Larrimore, 51 Mo. 130.

Mo. 1886. Where the petition of an administrator to sell real estate correctly describes the real estate, and the order of sale was made on the day and at the term stated, in the order of publication, there is no force in the objection to the order that it did not contain a description of the land.

Camden v. Plain, 4 S.W. 86, 91 Mo. 117.

Mo. 1894. A sale by an administrator under an order which does not describe the land is void.

Melton v. Fitch, 28 S.W. 612, 125 Mo. 281.

Mo. 1910. Where an original order directing an administrator to sell land fully described the land, it was unnecessary to set forth a full description in a continuing order.

Rhodes v. Bell, 130 S.W. 465, 230 Mo. 138.

⇐348. —— Modification, amendment, or vacation.

Mo. 1852. One claiming land under a deed from a former administrator cannot maintain a motion to set aside an order obtained by a subsequent administrator to sell the land for the payment of debts, since he is not interested in the estate of decedent, within Rev.St.1845, art. 3, § 24.

Shields v. Ashley's Adm'r, 16 Mo. 471.

Mo. 1910. Administrators' sales under orders of the probate court are "judicial sales," and the county court may modify an order of sale made by itself so as to authorize property which has been ordered to be sold at private sale to be sold at a public sale.

Rhodes v. Bell, 130 S.W. 465, 230 Mo. 138.

Mo. 1912. A probate court judgment decreeing and approving sale of land to pay debts will not be set aside because the claim was fraudulent and the action collusive; it not appearing that the court was deceived thereby.

McDonald v. McDaniel, 145 S.W. 452, 242 Mo. 172.

⇐349. —— Operation and effect.

⇐349(1). In general.

Mo. 1883. Under Rev.St.1879, § 168, providing that, if the report and proceedings of an executor or administrator in making a sale of land are not approved by the court, his proceedings shall be void, an order of sale before order of approval of the sale is neither final, nor conclusive, but may be impeached by interested parties, by evidence tending to prove that the facts on which the order was based are untrue.

Fenix v. Fenix's Adm'r, 80 Mo. 27.

Mo. 1891. Where the probate court orders real estate sold for debts, the prima facie presumption is that it is subject to sale, and the burden of showing it was exempt as a homestead is on the parties entitled to the homestead.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Mo. 1893. Though after the lapse of years exhibits may not be found among the numerous papers of an estate, such fact does not impair the validity of an order for sale by an administrator, in favor of which every presumption is to be indulged that would be indulged in favor of the judgment of a court of general jurisdiction.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

Mo. 1914. The validity of an order directing the sale of a decedent's property to pay debts was not affected by the fact that the probate court granted a rehearing of the demands allowed, after the order directing the sale.

Wilson v. Wilson, 164 S.W. 561, 255 Mo. 528.

Mo. 1914. A recital, in an order for the sale of real property, that the order of publication had been duly published is presumed to be true, in the absence of a showing to the contrary.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

Mo. 1941. Where a probate court makes an order of sale of realty on application of one who is not authorized by statute to make application, the order is void. Mo.St.Ann. § 146, p. 94, V.A.M.S. § 463.190.

Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95.

Mo.App. 1927. Probate court's order respecting sale and distribution of decedent's property is controlling. Rev.St.1919, § 104, V.A.M.S. § 462.390.

Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

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⇐349(2). Collateral attack.

Mo. 1853. A county court has jurisdiction, under Rev.Code 1835, p. 52, § 14, to order a reservation of the personal estate of a testator, and a sale of his real estate to pay debts, though he directed in his will that the debts be paid out of his personal effects, and hence such an order is not void, though it may be erroneous, and cannot be questioned in a collateral proceeding.

Overton v. Johnson, 17 Mo. 442.

Mo. 1855. In a collateral proceeding against heirs to obtain the legal title to the lands, a purchaser at an administrator's sale is not bound to maintain the truth of the facts on which an order of sale of the real estate is based.

Wolf v. Robinson, 20 Mo. 459.

Mo. 1886. The proceedings of probate courts in matters within their jurisdiction cannot be collaterally attacked; and, where the files and papers belonging to an estate have been lost, it will be presumed that the appointment of an administrator de bonis non, the order of sale of real estate, and everything connected therewith, were regularly made and in proper form.

Rowden v. Brown, 4 S.W. 129, 91 Mo. 429.

Mo. 1893. An administrator's deed of land, duly executed and acknowledged, which recites the order of sale, the appraisement of the premises, the sale made in pursuance of the order, the report of sale, its approval by the probate court, and payment, cannot be impeached collaterally by showing that the petition for the sale did not describe the land, since, under Rev.St.1879, § 147, such description may be obtained from exhibits filed with the petition; and the loss of such exhibits does not impair the order of sale, in favor of which every presumption is to be indulged that would arise in favor of the judgment of a court of general jurisdiction.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

An order of sale cannot be collaterally attacked for defects in the petition, where enough is shown to give the court jurisdiction.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

An order by a probate court for the sale of a decedent's land to pay his debts is a judgment of that court that the circumstances exist rendering a sale necessary; and the sale cannot be collaterally attacked on the ground that it was not necessary to pay decedent's debts.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1894. The statute provides that, if the personalty fail to pay the debts of the deceased, "his executor or administrator shall present a petition," etc. C. presented a petition, describing himself as "one of the administrators." The order of sale recited, "Now, at this day comes C. and E., administrators," and directed them to sell the land. C. made report that he had sold it, and the sale was approved, "the administrators" being ordered to make a deed to the purchasers, which they did. *Held*, that there was no irregularity available for collateral attack.

Stowe v. Banks, 27 S.W. 347, 123 Mo. 672.

Mo. 1897. The decision of the probate court that the delay in applying for an administrator's sale was not unreasonable is conclusive when collaterally assailed.

Howell v. Jump, 41 S.W. 976, 140 Mo. 441.

Mo. 1900. It is error to set aside, in equity, a deed executed by an administrator at a sale under an order of a probate court, where the record shows on its face no defect as to jurisdiction, and there is no evidence of fraud in obtaining the order of sale.

Covington v. Chamblin, 57 S.W. 728, 156 Mo. 574.

Mo. 1905. The probate court, in an order for the sale of lands of a decedent, having found that due publication had been made of the notice of the sale, the order was not subject to collateral attack, though the proof of publication was made by the publishers as a firm.

Robbins v. Boulware, 88 S.W. 674, 190 Mo. 33, 109 Am.St.Rep. 746.

Though only twenty-two days' notice was given of an administrator's sale, when the statute required four weeks' notice, the probate court having found, in its order of sale, that the notice had been published for four weeks, it could not be attacked collaterally because of insufficiency of the notice.

Robbins v. Boulware, 88 S.W. 674, 190 Mo. 33, 109 Am.St.Rep. 746.

Mo. 1910. Where a probate order directing an administrator's sale of a leasehold was void, it was subject to collateral attack, and the sale thereunder conveyed no title to the purchaser.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1910. The decision of the probate court that the debts of a decedent are un-

paid, and that there is not a sufficient personal estate to pay the same, and directing a sale of real estate to pay debts, is within its jurisdiction to determine the facts, and it is not open to collateral attack by heirs and legatees of the decedent assailing the title of one claiming under an administrator's sale pursuant to the order.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Where the heirs and legatees received sufficient notice of an application for the sale of decedent's real estate to pay debts, to give the probate court jurisdiction, they must contest the finding that there was no personal estate sufficient to pay the debts, and where they are dissatisfied with the order of sale, they must appeal therefrom, and they cannot collaterally attack the order on the ground of the sufficiency of the personal estate to pay debts.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Mo. 1919. In action to determine title to realty, circuit court could question jurisdiction of probate court, in ordering sale of realty to plaintiff by decedent's executor, by inquiring further than record made in probate court as to fact of suit to contest will in circuit court.

Johnson v. Brewn, 210 S.W. 55, 277 Mo. 392.

Mo. 1930. Order of probate court approving administrator's sale was final judgment, impervious to collateral attack.

Scanland v. Walters, 26 S.W.2d 603, 324 Mo. 1084.

Mo. 1941. Where petition in probate court for sale of intestate's realty was instituted under statute providing that a creditor or any other person interested in estate may file such petition, and it affirmatively appeared from probate court's record that petitioner was not entitled to petition for sale because it was not a creditor nor interested in estate, probate court had no jurisdiction to enter a judgment ordering sale of realty, and such judgment was void and subject to "collateral attack". Mo.St.Ann. § 146, p. 94, V.A.M.S. § 463.190.

Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95.

Mo. 1947. Judgment obtained by default against insane person was void ab initio and orders of probate court allowing against deceased defendant's estate the demand based on such judgment and ordering sale of decedent's land were likewise void and neither original judgment nor orders of probate court constituted probable cause which would preclude recovery of damages for malicious prosecution based on such proceedings.

Ripley v. Bank of Skidmore, 198 S.W.2d 861, 355 Mo. 897.

⇐350-352.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐353. Appraisal of property to be sold.

Mo. 1838. Under the Spanish laws an appraisement was not necessary to the validity of an administrator's sale of land.

McNair v. Hunt, 5 Mo. 300.

Mo. 1873. An affidavit, made and signed by three appraisers, appointed to appraise land about to be sold by an administrator, having the appraisement immediately following and attached thereto, commencing, "We appraise as follows," etc., is sufficient, although the signatures were not also appended to the appraisement.

McVey v. McVey, 51 Mo. 406, affirmed Pattee v. Thomas, 58 Mo. 163.

An appraisement of property for the purpose of an administrator's sale, sworn to by two out of three appraisers, is sufficient, under Wag.St. p. 887, § 6, providing that words importing joint authority to three or more persons shall be construed as authority to a majority.

Mo. 1873. Moore v. Wingate, 53 Mo. 398.

Mo. 1877. Johnson v. Beazley, 65 Mo. 250, 27 Am.Rep. 276.

Mo. 1873. The fact that an administrator took the affidavit of the appraisers will not render the administrator's sale void.

Moore v. Wingate, 53 Mo. 398.

Mo. 1877. Under Wag.St. pp. 93, 94, §§ 2, 3, which provide that if any person die, having purchased real estate, and shall not have completed the payment, nor devised such estate, nor provided for the payment by will, and the completion of such payment would be beneficial to the estate, and not injurious to creditors, the executor or administrator, by order of the court, may complete such payment out of the assets in his hands, and such estate shall be disposed of as other real estate, and that, if the court believes that after the payment of debts there will not be sufficient assets to pay for such real estate, the court may order the executor or administrator to sell all the right, title, and interest of the deceased therein, a sale of real estate by an administrator, the purchase price of which had not been paid by decedent, made on due notice and report, in accordance with an order of the court, is not invalid by

reason of the fact that it was made without a petition and appraisement.

Garrett v. Bicknell, 64 Mo. 404.

Mo. 1894. An appraisement of an estate by an administrator, made before the petition for sale, under Rev.St.1879, § 162, and Rev. St.1889, § 161, V.A.M.S. § 463.270, is filed, does not render the sale void, especially after its approval by the probate court.

Noland v. Barrett, 26 S.W. 692, 122 Mo. 181, 43 Am.St.Rep. 572.

⇐354. Second application.

Mo. 1891. Under Rev.St.1879, § 149, authorizing a probate court to sell a decedent's real estate, or any part thereof, for the payment of debts, where notice of sale is published under order of court, including all of the lands of the estate, an order of sale properly made, which excludes specific property from sale, exhausts the jurisdiction of the probate court upon that proceeding, and a sale of the land excluded cannot be had on a second application without a new notice.

Cunningham v. Anderson, 17 S.W. 972, 107 Mo. 371, 28 Am.St.Rep. 417.

Mo. 1894. When, after petition of the administrators, and order to show cause, land is ordered sold to pay debts, and the administrators afterwards repurchase it for the estate, a second order to sell it need not be founded on an order to show cause.

Stowe v. Banks, 27 S.W. 347, 123 Mo. 672.

⇐355-356.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐357. Restraining sale.

Mo. 1885. Where a sale of real estate, pursuant to an order of the probate court made 13 years after the grant of letters, will cast a cloud on plaintiff's title, he may apply to the circuit court for injunction to prevent such sale.

Gunby v. Brown, 86 Mo. 253.

Mo.App. 1890. A petition by heirs lies to a court of equity to set aside the judgment of the probate court on account of fraud and collusion, and to restrain the defendant administrator from selling the real estate for the purpose of satisfying the fraudulently procured judgment, though from the judgment of approval of a sale of real estate by the probate court an appeal will lie to the circuit court, and upon objection to the approval of the report of sale the heirs may show that the debts of the estate have been paid or have no existence, except by erroneous or fraudulent allowances to defeat the approval of the report.

Penn v. Penn, 39 Mo.App. 282.

⇐358. Review.

⇐358(1). Nature and form of remedy and appellate jurisdiction.

Mo.App. 1903. An appeal to the circuit court from an order of the probate court dismissing the petition in a proceeding to compel an administrator to sell real estate to satisfy a judgment lien was properly dismissed for want of jurisdiction, since, as no notice of the proceeding was given to the minor heirs, as required by Rev.St.1899, § 148, V.A.M.S. § 463.250, the probate court was without jurisdiction, and the circuit court could have none on appeal.

Hill v. Taylor, 74 S.W. 9, 99 Mo.App. 524.

⇐358(2). Persons entitled to review and decisions reviewable.

Mo. 1855. Under Rev.Code 1845, art. 8, § 1, allowing appeal from "all orders for the sale of real estate," an appeal lies to the circuit court from an order of a probate or county court approving an administrator's sale of real estate.

Wilson v. Brown's Adm'r, 21 Mo. 410.

Mo. 1862. Where the county court approves the report of an administrator's proceedings in regard to the sale of real estate, an appeal from this decision to the circuit court will lie, under Acts 1835, art. 8, § 1.

Wolff v. Wohlien, 32 Mo. 124.

Mo.App. 1901. Rev.St.1889, § 278, V.A. M.S. § 465.230, affords a creditor the right to appeal from an interlocutory order of sale.

Redman v. Adams, 88 Mo.App. 534.

⇐358(3). Proceedings for and effect of appeal.

Mo.App. 1945. A motion in probate court to set aside its orders for sale of testator's realty to pay legacies performed no legal function and hence did not carry case over from judgment term to next succeeding term so as to extend time for appeal to circuit court from probate court's order overruling motion. Mo.R.S.A. §§ 283, 285, V.A. M.S. §§ 467.020, 481.100 note.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

The filing of motion to set aside probate court's order approving executrix' sale of realty to pay legacies was not essential to entitle moving parties to appeal to circuit court from such order, so that motion served no useful purpose and did not carry case over from judgment term to next succeeding term as required to extend statutory time for ap-

peal. Mo.R.S.A. § 283, subds. 6, 15; § 285, V.A.M.S. §§ 467.020, 481.100 note.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐358 (4). Mode and extent of review, and determination and disposition of cause.

Mo. 1906. Rev.St.1899, § 278, V.A.M.S. § 465.230, gives an appeal from an order of a probate court for the sale of real estate, and provides than an appeal lies in all other cases from a final decision of any matter arising under the statute. *Held*, that where no appeal was taken from an order of sale, on appeal from the order of confirmation, a question as to the jurisdiction to make the order of sale for matter not appearing on the face of the record might be raised.

Desloge v. Tucker, 94 S.W. 283, 196 Mo. 587.

Mo.App. 1903. An appeal to the circuit court from an order of the probate court dismissing the petition in a proceeding to compel an administrator to sell real estate to satisfy a judgment lien was properly dismissed, no notice of the proceeding having been given to the minor heirs as required by Rev.St.1899, § 148, V.A.M.S. § 463.250.

Hill v. Taylor, 74 S.W. 9, 99 Mo.App. 524.

Mo.App. 1920. On error to approval by circuit court of order of probate for sale of real estate to pay debts of decedent's estate, attack on allowance of some of the claims cannot be considered.

Bloyd v. Hartman, 223 S.W. 676.

⇐359. Failure to procure sale.

Mo. 1894. An administrator is not guilty of laches for delay in selling land, where it appears that the delay was caused by frequent disapproval of attempted sales, and by injunction proceedings by other parties.

Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

(C) SALE.

⇐360. Authority and powers in making sale in general.

Mo. 1910. An administrator making a sale of real estate to pay decedent's debts pursuant to an order of the probate court directing a sale is an officer or agent of the court in making the sale.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Mo.App. 1890. Rev.St.1889, c. 1, nowhere confers on an executor any power to sell the testator's real estate, except for debts, and, when the authority for the sale is derived from the statutory provision, the executor making the sale acts in obedience to the orders of the probate court, and he is subject to its control, and the court possesses in such case full supervisory jurisdiction in all matters respecting the same.

In re Rickenbaugh, 42 Mo.App. 328.

⇐361. Statutory provisions.

Mo. 1915. Where the law permits an administrator to purchase at his own sale, he may do so, and his title is unaffected by subsequent statutes.

Biedenstein v. Schoenlau, 178 S.W. 54.

⇐362. Notice.

Mo. 1853. Where at the time of the sale the advertisement of sale was not required to be made part of the record, and no means was provided for its preservation, a failure to show such advertisement, in an attack, on the sale 40 years afterwards, will not avoid it.

Vasquez v. Richardson, 19 Mo. 96.

Mo. 1855. The mere failure by an administrator to give the required notice of a sale of personal property will not, of necessity, invalidate the title of the purchaser.

James v. Dixon, 21 Mo. 538.

Mo. 1858. After a lapse of 40 or 50 years from the sale of land to pay an intestate's debts under an order of the general court, proof of the advertisements which the law required and the court ordered would hardly be expected or required. The administrator's report is sufficient.

Blair v. Marks, 27 Mo. 579.

Mo. 1875. Under Wag.St. p. 100, art. 3, c. 2, § 47, allowing a sale of real estate on the annual settlement of the executor or administrator, where the personalty is insufficient to pay the indebtedness, no notice of sale is required, as the settlement itself appears as a notice.

Patee v. Mowry, 59 Mo. 161.

Mo. 1910. Act Feb. 11, 1875, Laws 1875, p. 425, changing the time for the holding of the April term of the probate court to the first Monday of April, directed that all writs, process, and notices returnable to such court next after the taking effect of the act should be made returnable to the first term of the county court held for the transaction of probate business. *Held*, that an order for publication of notice of sale of real estate, being a substituted process for the sale of real estate, was "process and notice" within the meaning of the act, and the clerk properly changed the return day of an order of publication made before passage of the act so as to conform the same thereto.

Rhodes v. Bell, 130 S.W. 465, 230 Mo. 138.

For later cases see same Topic and Key Number in Pocket Parts

Mo. 1913. Under Rev.St.1889, § 147, V.A.M.S. § 463.250, providing for four weeks' publication for sale of land by an administrator, a full 28 days is necessary.

Norton v. Reed, 161 S.W. 842, 253 Mo. 236.

Notice is an indispensable prerequisite to the jurisdiction of the probate court to order a sale of the land of a decedent.

Norton v. Reed, 161 S.W. 842, 253 Mo. 236.

That the judge before whom proof of publication for the sale of decedent's land was taken did not sign the blank jurat attached to the publisher's affidavit, will not invalidate proofs of publication.

Norton v. Reed, 161 S.W. 842, 253 Mo. 236.

Mo. 1914. An order of publication for an administrator's sale of real property, published in 1864, which notified all persons interested in the estate of the facts required by Rev.St.1855, c. 22, art. 3, § 25, was sufficient notification to the heirs under the law then existing.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

⇐363. Manner and conduct.

Mo. 1848. The sheriff is not empowered to sell the real estate of a deceased person for his debts.

Jarvis v. Russick, 12 Mo. 63.

Mo. 1873. The sales of lands by administrators will be liberally construed by the courts as to matters of form, and their validity will be maintained where the directions of the statute have been substantially complied with.

Tutt v. Zenir, 51 Mo. 431, affirming Tutt v. Boyer, 51 Mo. 425.

Mo. 1878. An administrator's sale, which was not made during the session of the probate court, or the circuit or county court, was void.

Mobley v. Nave, 67 Mo. 546.

Mo. 1881. 1 Wag.St. p. 94, § 3, authorizes the probate court, when there is a lack of sufficient assets to pay for real estate purchased by a decedent to order the administrator to sell all the right, title, and interest of the deceased therein; but the section does not state whether the sale shall be public or private. An order for a sale authorized the administrator to sell the interest of the deceased in land purchased by him "in accordance with law," and private sale was had, and at the time of the sale the land was incumbered by a deed of trust executed by the purchaser for the purchase money. *Held*, that though the sale was not made publicly, as expressly required by section 8 of the statute, under the circumstances existing in the case, it not appearing that the court was apprised of the true state of the case, the action of the court and the manner of making the sale were not open to a collateral attack.

Hand v. Motter, 73 Mo. 457.

Mo. 1894. Where, under a proper order of sale from the court, an administrator advertised a sale of land to take place February 14th, on which day he adjourned the sale to February 19th, when the sale was made, and the adjournment and sale were confirmed by the court, such adjournment did not make the sale void.

Noland v. Barrett, 26 S.W. 692, 122 Mo. 181, 43 Am.St.Rep. 572.

Mo. 1910. Where a probate order directing an administrator to sell a leasehold belonging to the estate to pay debts did not contain a direction to sell at private sale, it would be construed to require a public sale, especially where the lease itself provided that, in case of default by the lessee or his legal representatives or assigns in the payment of rent, the lease might be sold at public auction after two weeks' published notice.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo.App. 1886. Rev.St. § 167, relating to administration and the sale of lands of a decedent, provides that after such sale the executor or administrator shall make a full report of his proceedings, with the certificate of appraisement and a copy of an advertisement, which report shall be verified, stating that he did not directly or indirectly purchase such real estate, or any part thereof, or any interest therein. *Held* that, while the statute does not expressly provide who shall make a sale of lands, it seems to contemplate that the administrator should do it, and there is no authority for a decree directing one who has petitioned for a sale to make the sale.

Brown v. Woody, 22 Mo.App. 253.

⇐364. Terms and conditions.

Mo.App. 1932. Administratrix privately selling intestate's realty could agree to any terms, not unqualifiedly injurious to estate or forbidden by law, which might enter into securing purchaser, or which purchaser might, in good faith and under law, require before becoming purchaser. Rev.St.1929, §§ 135, 138, 140, 162, 165, 182, V.A.M.S. §§ 462.320, 462.350, 462.370, 463.300, 463.350, 464.010.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

For references to other topics, see Descriptive-Word Index

⇐365. Persons who may purchase.

Mo. 1853. Under the Spanish government in Missouri, when no bidder presented himself at an executor's sale of a common field lot, which was subject to a charge for keeping the common fence in repair, the lieutenant governor transferred the same to the executor, upon his assuming to bear the charge. It was *held* that this transfer should be regarded as a governmental act, made upon considerations affecting the public, as well as from a regard to the interests of the estate, and did not come within the rule that an executor could not purchase property which it was his duty to administer.

Charleville v. Chouteau, 18 Mo. 492.

Mo. 1853. A sale by the purchaser to the administrator, subsequent to the administrator's sale, will not warrant a presumption of fraud.

Vasquez v. Richardson, 19 Mo. 96.

Mo. 1870. That a trustee, such as an executor, etc., cannot become a purchaser or interested in a purchase at his own sale, is too well and thoroughly settled to permit discussion; and the same rule applies with almost equal force to the employment of the auctioneer or trustee to make bids for the purchaser.

Hull v. Voorhis, 45 Mo. 555.

Mo. 1875. The purchase of lands at an administrator's sale, and the subsequent sale by the purchaser to the administrator for a nominal consideration, is voidable at the election of parties having adverse interests, but is not void.

Mitchell v. McMullen, 59 Mo. 252.

Mo. 1876. An administrator cannot purchase at a sale of the intestate's land by himself as administrator.

Clark v. Drake, 63 Mo. 354.

Mo. 1882. Under Revision 1845, pp. 87, 88, §§ 31, 34, relating to purchase of real estate by administrators, a conveyance by an administrator to his coadministrator passes no title.

Greene v. Holt, 76 Mo. 677.

Mo. 1896. The purchase of the land of an estate by one of several heirs, at a sale under order of court for the payment of decedent's debts, does not inure to the benefit of the other heirs.

Aubuchon v. Aubuchon, 34 S.W. 569, 133 Mo. 260.

Mo. 1902. Under Gen.St.1865, §§ 32, 35, which prohibited an administrator from purchasing realty of the estate for less than its appraised value, and required such sale to be approved by the court, and the deed executed by the clerk, a purchase of such realty, by an administrator or his attorney, at an administrator's sale under order of court, held prior to the repeal of the statute in 1879, and properly approved by the court was valid, in the absence of fraud on the part of the administrator.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo. 1910. Under Rev.St.1899, § 166, Ann.St.1906, p. 391, V.A.M.S. § 463.300, prohibiting an administrator from purchasing directly or indirectly real estate sold by him under an order of the probate court, to pay debts of decedent, an administrator may not establish any title to land sold under an order of the probate court by virtue of the fact that he as administrator was the real purchaser, or furnished the purchase money to a third person who purchased the property.

Pearson v. Murray, 130 S.W. 21, 230 Mo. 162.

Mo. 1913. Under the express terms of Rev.St.1879, § 166, an executor cannot directly or indirectly purchase land at his own sale.

Gilmore v. Thomas, 158 S.W. 577, 252 Mo. 147.

Mo. 1915. Gen.St.1865, c. 122, §§ 32–35, permitted an administrator to buy directly or through an intermediary at his own sale, provided he did not purchase at less than appraised value.

Biedenstein v. Schoenlau, 178 S.W. 54.

Mo. 1920. The mere circumstance of a subsequent sale to the executrix before final discharge by the purchaser at a sale made by executrix raises no presumption of collusion, at least not as a matter of law, and does not render the sale void under Rev.St.1909, § 170, V.A.M.S. § 463.300.

Mumbach v. Nienhaus, 219 S.W. 354.

Mo. 1945. The invalidity of a sale by executor to himself directly or indirectly does not depend upon proof of damage to estate, since statute voiding such sale is on expression of public policy that it is unwise to permit possibility of administrator or executor making unjust profit at expense of estate in his trust. Mo.R.S.A. § 161, V.A.M.S. § 463.300.

Wortham v. Marten, 188 S.W.2d 11, 354 Mo. 1.

Mo.App. 1915. Under Rev.St.1909, §§ 150, 170, V.A.M.S. §§ 463.170, 463.300, an administrator may purchase his intestate's land sold by process of the circuit court unless sold to pay debts.

Goellner v. Goellner, 178 S.W. 229.

For later cases see same Topic and Key Number in Pocket Parts

⇐366. Bids or offers.

Mo. 1879. Wag.St. p. 94, § 3, relating to land purchased by deceased for which the purchase money is unpaid, provides that if the court believe, after the payment of debts, there will not be sufficient assets to pay for such real estate, it may order the executor or administrator to sell all the right, title, and interest of the deceased therein. *Held* that, where sale is made of property on which there is a vendor's lien, the purchaser acquires only the right, title, and interest of the deceased, and, where the vendor became purchaser, his bid was, in effect, the amount of his lien, as well as the sum at which he purchased at the sale.

Ross v. Julian, 70 Mo. 209.

Mo. 1891. Where two attorneys representing allowed claims against the estate of a decedent in excess of the value of certain land, constituting the whole estate, agree that, as between themselves, all the allowances shall be of equal rank, and that upon a sale of the land one of them shall buy it for the use of all the creditors "pro rata," unless some other person shall bid enough to pay the debts, such contract is not fraudulent, as preventing competition, and a purchase pursuant to its terms is valid.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

⇐367. Validity in general.

Mo. 1853. An administration sale, under the act of 1807, is not void because the affidavit of the administrator that he was not the purchaser was not made within the time required by law.

Vasquez v. Richardson, 19 Mo. 96.

Mo. 1854. One of two administrators having died, new letters were granted to the survivor and another; there being no express revocation of the old letters. A sale by the last is valid.

Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

An administration sale of land is void if the record shows that the notice which the law requires to precede the order of sale could not have been given.

Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Mo. 1874. The fact that, at an administrator's sale, a tract of land was purchased by the probate judge, contrary to law, does not invalidate a deed of a different tract sold to another person at the same sale, although both sales are included in the same report to the probate court.

Bacon v. Morrison, 57 Mo. 68.

Mo. 1877. Where the records of the probate court show that an administration sale was made without any order authorizing it, the sale is void.

Evans v. Snyder, 64 Mo. 516.

Mo. 1887. Where a public administrator is directed to take charge of an estate, he has the right to continue administration till the estate is fully administered, or until he is discharged in course of law, as other administrators; and, where no final settlement or discharge appears of record, a deed made by him as administrator is valid, although there is a recorded entry of an order prior to the date of the deed directing him to turn over the estate to his successor in office.

Warren v. Carter, 5 S.W. 42, 92 Mo. 288.

Mo. 1891. Plaintiff, claiming as heir and the grantee of other heirs, in proceedings to set aside a probate sale of decedent's realty on the ground of irregularities, cannot avail himself of the fact that he had a homestead right in the land, where he did not assert the right in his petition, nor make the widow and other heirs parties, as they are necessary parties in any proceeding to set apart the homestead exemptions.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Mo. 1893. Where the public administrator has been appointed administrator de bonis non in his individual capacity, his designation in subsequent proceedings as public administrator does not estop purchasers at sales made by him as private administrator from denying that he then acted as public administrator.

Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1897. An administrator's sale of land, made for the purpose of paying debts, is valid, though the land sold for only enough to pay the costs of administration.

Howell v. Jump, 41 S.W. 976, 140 Mo. 441.

Mo.App. 1898. Where the statements of an executor, making a sale of his decedent's realty, were such as to mislead bidders and induce them to bid on the property under the belief that they would get a marketable title, a purchaser is entitled to a judgment for the money he has paid.

McKeag v. Piednor, 74 Mo.App. 593.

⇐368. Payment of purchase money.

Mo. 1878. Where, on a sale of land by an administrator, under an order of sale directing a credit of 12 months and the taking of a bond and security for the purchase mon-

ey, he accepted a mortgage of the land, which described him as administrator, and thereafter sold the land under the mortgage, it was proper for him to give a deed in his own individual name.

Wilkerson v. Allen, 67 Mo. 502.

The failure of an administrator to take a bond with security for the purchase money of land sold by him under order of court does not render a deed made by him a nullity.

Wilkerson v. Allen, 67 Mo. 502.

Mo. 1888. Two tracts were sold to decedent's surviving partner, subject to two mortgages, and by his direction the deed to one tract was made to defendant, who had married decedent's widow. No money was paid to the administrator, but he charged himself with the amount of the bid, and credited himself with a claim held by the surviving partner, as he alleged, by agreement of both defendant and the partner. No such claim was ever allowed against the estate, but it appeared that the surviving partner received as devisee such claim against the firm, which he agreed to cancel if defendant would pay off the mortgages on the land sold, as he did; the surviving partner making no objections in his lifetime. *Held*, that the heirs of the surviving partner were not entitled to have the deed to defendant set aside for want of consideration.

Day v. Graham, 11 S.W. 55, 97 Mo. 398.

Mo. 1932. Purchaser of realty, where tendered deed of executors conveyed good title, *held* required to pay interest from date deed was tendered.

Trautz v. Lemp, 46 S.W.2d 135, 329 Mo. 580.

Mo.App. 1899. In proceedings for the sale of real estate of a testator for the payment of his debts, it appeared that the terms of sale were one-fourth cash and for the remainder the purchaser should give a note. The purchaser did not comply with the terms, but the purchaser was the holder of the entire indebtedness of the estate, so that, if he had complied with the terms of the sale, and made the cash payment to the executor, the executor would have been bound to immediately repay the purchaser, as the holder of the indebtedness of the estate. *Held*, that the sale was properly confirmed.

In re Albert's Estate, 80 Mo.App. 557.

⇐369. Failure of bidder to complete purchase.

⇐370. —— In general.

For cases from other jurisdictions, see other Key Number Digests.

⇐371. —— Resale.

Mo. 1877. Where sureties of an administrator have paid a judgment rendered against them and the administrator, in favor of a creditor of the estate, for the failure of the administrator to collect the purchase money on a sale of real estate to pay the indebtedness of the estate, the proper mode of enforcing reimbursement of the sureties is to have the sale set aside and a resale made for their benefit, and such sureties have no right to have their claim allowed against the estate.

Wernecke v. Kenyon's Adm'r, 66 Mo. 275.

Mo. 1893. A probate court, which has ordered a sale of decedent's land for the payment of debts, does not lose jurisdiction until a sale has been actually consummated; and its approval of the administrator's report that the land had been knocked off to the highest bidder, and that he was willing to comply with his bid on approval of the court, does not prevent it from ordering a resale on such bidder's refusal to comply with the terms of his bid.

Greffet v. Willman, 21 S.W. 459, 114 Mo. 106.

⇐372-373.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐374. Report or return.

Mo. 1878. The same particularity of description is not required in an administrator's report of sale as is necessary in his deed, and if the record show an approval of a sale of a given tract, though no such description of the land is found in the report as would be necessary in a deed, it would authorize the administrator to make a sufficient deed, or on his failure to do so would authorize a court of equity to vest the title in a bona fide purchaser.

Gilbert v. Cooksey, 69 Mo. 42.

Mo. 1890. A premature report and approval does not make an administrator's sale void. The report may be made and the sale approved at a term later than the one next after the sale.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St. Rep. 595.

Mo. 1894. A report of sale by the administrator after he has been discharged is void.

Melton v. Fitch, 28 S.W. 612, 125 Mo. 281.

For later cases see same Topic and Key Number in Pocket Parts

⇐375. Confirmation.

Mo. 1854. Under Rev.Code 1835, which, in the chapter concerning administrators and executors, requires an administrator to report proceedings for sales of lands at the term of court succeeding the sale, and provides that, if the report is not approved, the sale shall be void, and a new sale ordered by the court, an administration sale of land is not valid until reported to and confirmed by the court, and the approval shown by the record.

Valle v. Fleming, 19 Mo. 454, 61 Am.Dec. 566.

Mo. 1871. Strict compliance with a statutory requirement that proceedings concerning administrators' sales of real estate shall be reported to the court at the next term of the court after such sale is essential to the validity of such sale. Hence a sale, made during and reported to the same term of the court at which the order of sale was granted, is null and void.

Mitchell v. Bliss, 47 Mo. 353.

Mo. 1872. The judgment of a county court approving the report of sale made by an administrator, under Sess.Acts 1857, p. 26, providing that such court may dispense with an advertisement of sale in a newspaper, raises the presumption that such advertisement was in fact dispensed with.

Jackson v. Magruder, 51 Mo. 55.

Mo. 1873. The approval of an administrator's sale of land cures defects in the form of proceedings arising from the fact that the public administrator included in the same advertisement the estates of several persons to be sold.

Tutt v. Boyer, 51 Mo. 425, affirmed 51 Mo. 431.

Mo. 1875. Where an administrator's conveyance of land ordered to be sold by the probate court contained all requisite recitals, and was acknowledged before the probate judge as ex officio clerk, and the records show that on the day the conveyance was made the court allowed the administrator to correct an error in the description of a portion of the land sold, such sale was not void because no formal entry of approval was made on the record of the court.

Jones v. Manly, 58 Mo. 559.

Mo. 1875. Where a public administrator has made a final settlement, and the probate court has approved the same, which approval remains in force, the probate court has no power thereafter to make an order approving a sale made prior to the filing of the final settlement, and a deed given by the administrator is void.

Garner v. Tucker, 61 Mo. 427.

Mo. 1876. An entry in the record of an administrator's sale that the administrator's report was received and ordered to be spread on the record shows an approval of the sale, although no formal entry of approval appears.

Grayson v. Weddle, 63 Mo. 523.

Mo. 1877. That a sale made by an administrator was not approved at the term of the county court next after the sale, on account of the vacation of the offices of the judges of that court, did not render an order of confirmation made at a subsequent term void, but voidable merely.

Murray v. Purdy, 66 Mo. 606.

Mo. 1877. Where all persons interested are before the probate court on the entry of an order approving a sale of land made by the administrator, the fact that the order is made at the same term of the court at which the sale took place does not render the order of confirmation void, but voidable merely.

Sims v. Gray, 66 Mo. 613.

Mo. 1878. Recital, in the order approving a sale of land by the public administrator, that the administrator filed at the same time "a sale bill of said real estate," must be construed as referring to a deed of the real estate.

Long v. Joplin Mining & Smelting Co., 68 Mo. 422.

Mo. 1883. A sale of land was made by an administrator in pursuance of an order of court and the report of sale made out, but was not submitted to the court until more than a year thereafter, at which time an order was made approving the sale as of the term at which it was made. On the same day another order was made, revoking the letters of administration and appointing a successor. The approval of the report and the revocation of the letters were contemporaneous acts. *Held*, that the sale was valid, notwithstanding the irregularities.

Wilcoxon v. Osborn, 77 Mo. 621.

Mo. 1886. There was no formal entry of approval by the probate court, but the deed acknowledged before the probate court contained a recital of approval. The administrator in his settlement charged himself with the purchase money, and the judge's minutes contained this entry: "Report of sale of real estate of W. C. approved. Deed ordered, and deed acknowledged." *Held*, that it was sufficient if the approval could be thus gathered from the record.

Camden v. Plain, 4 S.W. 86, 91 Mo. 117.

Mo. 1890. The law does not require an administrator's sale to be approved at the term when the report was made, and the

approval at a subsequent date is not irregular or erroneous.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

A premature report and approval does not make an administrator's sale void. The report may be made and the sale approved at a term later than the one next after the sale.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

Mo. 1890. The statutes of 1835, relating to the sale of land by an administrator do not, like the statutes of 1845 relating to the same subject, make the deed of the administrator evidence of matters stated therein; but the statutes of 1835 require the administrator to report the sale to the court, with the certificate of appraisement and a copy of the advertisement, and the report must be approved by the court. *Held*, that the approval is in effect a judgment that the sale has been conducted according to law and the order of the court, and it is not incumbent upon one claiming under the deed to produce any evidence additional to the deed and the order approving the sale.

Hughes v. Sloan, 14 S.W. 660, 15 S.W. 756, 102 Mo. 77.

Mo. 1890. An administrator in 1858 sold land of his decedent for debts under an order of court, and executed a deed, which was acknowledged before the judge of probate. In his final settlement he accounted for the precise sum for which the land was sold, and there was no other property with which to pay debts. Rev.St.1855 provided that if the report of sale was approved, then the administrator should make a deed. *Held*, that it would be presumed that the sale was confirmed, the statute not requiring an express order to that effect.

Agan v. Shannon, 15 S.W. 757, 103 Mo. 661.

Mo. 1891. An order of the probate court approving a sale of land for the payment of a decedent's debts does not render valid a sale void for want of an order of publication of notice of the proceedings required by the statute.

Cunningham v. Anderson, 17 S.W. 972, 107 Mo. 371, 28 Am.St.Rep. 417.

Mo. 1897. A formal order approving an administrator's sale of land is not essential, it being sufficient if such approval can be gathered from the whole record.

Carey v. West, 40 S.W. 661, 139 Mo. 146.

Mo. 1906. Rev.St.1899, § 167, V.A.M.S. § 463.330, provides for a full report of an administrator's proceedings under an order for a sale of a decedent's real estate, and section 168 provides that if the report and proceedings be not approved, the proceedings shall be void. *Held*, that where an administrator sold land under an order for a private sale for about half what it was worth, and for less than would pay debts and legacies, and the heirs were interested in a surplus, which would have arisen at a sale for the full value, the probate court should not have confirmed the sale.

Desloge v. Tucker, 94 S.W. 283, 196 Mo. 587.

Rev.St.1899, § 148, V.A.M.S. § 463.250, provides that on filing a petition for a sale of land of a decedent, a notice shall be published; provided, that where the heirs or devisees are residents of the county, personal service must be made. *Held*, that where, on appeal from an order confirming a sale, it appeared that there was notice by publication only, but it did not appear whether the heirs and devisees were residents, it would be presumed they were not.

Desloge v. Tucker, 94 S.W. 283, 196 Mo. 587.

Mo. 1910. There being no statute directing that an administrator make a report to the court of a sale of personal property at private sale, nor empower the probate court to approve or confirm such a sale, the court's approval and confirmation thereof added nothing to its validity, and did not cure any defects in the order authorizing it.

Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486, 225 Mo. 414, 20 Ann.Cas. 1072.

Mo. 1910. The probate court directing a private sale of real estate to pay a decedent's debts has jurisdiction to confirm a public sale, and its judgment of confirmation is not subject to collateral attack.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

A sale of real estate under an order of the probate court ordering a sale to pay debts of a decedent is a judicial sale, and the confirmation thereof by the probate court cures all prior irregularities, provided the court obtained jurisdiction of the subject-matter and the parties.

Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Mo.App. 1877. Power of probate court, 20 years after an executor's sale of land of a decedent, and after the final discharge of the executor, to enter a decree confirming the sale and directing the executor to make a proper deed. See,

Polk's Heirs v. Schulenburg, 4 Mo.App. 592, memorandum.

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Mo.App. 1898. The order of a probate court approving the report of a sale of land by an administrator was in the nature of a final judgment, and heirs who did not avail themselves of the right of appeal therefrom were concluded thereby, unless the court acted without jurisdiction.

Hesche's Estate v. Schnecko, 73 Mo.App. 612.

Mo.App. 1899. As a rule a sale of real estate by an executor or administrator for the payment of debts ought not to be approved unless the terms of the sale have been complied with by the purchaser, and a deed ought not to be ordered made until the purchase price has been fully paid.

In re Albert's Estate, 80 Mo.App. 557.

Mo.App. 1937. Appeal from order of probate court approving administrator's sale of realty *held* allowable though no objections were filed to report, under statute allowing appeal "in all cases not expressly prohibited by law". Mo.St.Ann. § 1938, p. 2605, V.A.M.S. § 441.270.

In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139, transferred Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506.

Proceeding for approval of sale of realty by administrator was in equity, and would be determined de novo on appeal from judgment of circuit court disapproving report of sale.

In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139, transferred Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506.

On appeal from probate court's order approving sale of realty by administrator, circuit court *held* entitled to proceed as though it had original jurisdiction, determining cause in light of evidence and uninfluenced by finding and order of probate court, as against contention court had no jurisdiction save over matters litigated in probate court.

In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139, transferred Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506.

Question of "inadequacy of consideration," as term is ordinarily used, was not applicable to order approving administrator's report of sale of realty, but such sale was governed by rule that consideration must be not less than three-fourths of land's appraised value.

In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139, transferred Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506.

Where land appraised at $5,688 was sold by administrator for "$5,688, $100 cash and purchaser taking subject to encumbrances," and where county held mortgage claim of $5,500 and tax claim of $500, controversy as to validity of mortgage, raised by creditor of estate on appeal from order approving report of sale, and to which county was not a party, *held* to require disapproval of sale by Court of Appeals, where court had no jurisdiction to determine controversy, since sale could not be approved in absence of proof that consideration was not less than three-fourths of the value of land.

In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139, transferred Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506.

⇐376. Persons who may question validity.

Mo. 1854. A minor heir, receiving by distribution the purchase money of land of his ancestor sold under a void decree, is not estopped from asserting title, unless, after majority, he ratifies such distribution.

Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Mo. 1874. An administrator's sale of lands for the payment of debts of the estate under the order of the probate court is in pursuance of a statutory power, and operates to devest the title of the heirs therein, and such sale is in invitum as to such heirs.

Jones v. Carter, 56 Mo. 403.

⇐377. Estoppel and ratification of invalid sale.

Mo. 1894. Where land was unlawfully sold by an administrator, a married woman who was the sole heir, and who never received any of the purchase money, is not estopped to claim the land by the fact that, thinking the sale was legal, she permitted the purchaser to make improvements and pay taxes.

Throckmorton v. Pence, 25 S.W. 843, 121 Mo. 50.

Mo. 1901. Where a grantee of land died intestate, and her half interest therein was sold by her administrator, plaintiff, who was one of her heirs at law, by receiving from and receipting to his administrator for his distributive share of the estate, is estopped from asserting title to the land conveyed by the administrator's deed.

Cadematori v. Gauger, 61 S.W. 195, 160 Mo. 352.

Mo. 1902. Where a widow failed to prosecute her petition for allotment of her homestead in the probate court, and abandoned her objections to the administrator's

petition to sell certain land claimed by her to be exempt as her homestead, and herself bid for the land at the sale after having unsuccessfully attempted to induce the purchaser not to bid, she was not thereby estopped from claiming that the land was exempt as her homestead.

Houf v. Brown, 71 S.W. 125, 171 Mo. 207.

Mo. 1903. Where an heir received his distributive share arising from the proceeds of the sale of lands by the executor for the payment of debts, as did also his brothers and sisters, through whose deeds such heir claimed title to the property, he was estopped to assert such title as against the title conveyed by the deed executed in pursuance of the executor's sale.

Meddis v. Kenney, 75 S.W. 633, 176 Mo. 200, 98 Am.St.Rep. 496.

Mo. 1921. Where children and a grandchild of a deceased owner of a homestead knew nothing of the sale by the administratrix for the payment of debts and received none of the proceeds, and the administratrix refused to file the petition for such sale, which was made upon petition of creditors, the children and grandchild were not estopped to attack the sale.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

⇐378. Curative statutes.

For cases from other jurisdictions, see other Key Number Digests.

⇐379. Opening or vacating.

Mo. 1875. A judicial sale of over 6,000 acres of land for $600 *held* not to warrant the intervention of equity for inadequacy of price.

Phillips v. Stewart, 59 Mo. 491.

Mo. 1891. Where an order of sale of the lands of a decedent to pay debts was procured by the representation of an attorney, representing creditors, that the property should be made to pay $1,000, but at the sale he failed to bid more than $100, at which figure the property was sold, and the sale confirmed by the court ordering it, the proper remedy is by appeal from the order of confirmation, and such facts will not support a bill to set aside the sale as obtained by fraud.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Allowances by the probate court of claims against the estate of a decedent are judgments of record, and the validity of an order of sale for their satisfaction cannot be attacked by evidence aliunde, to show that they had been paid or settled before the order was made.

Murphy v. De France, 15 S.W.2d 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Mo.App. 1902. A purchase of property of an estate by the administratrix at its appraised value cannot be set aside at her own instance, though she had been imposed on and had bought at an excessive price, where she had retained the property for more than a year, and made payments on it, and only one creditor was represented in the proceeding to set it aside, and none of the heirs.

Benson v. Benson, 71 S.W. 360, 97 Mo. App. 460.

Mo.App. 1913. Where a sale of land by an administrator was approved, *held*, that the purchaser was entitled to notice of an application to set aside the sale and resell the land; and, not having received notice thereof, no action can be maintained against him for a deficiency in price upon resale.

Rusk v. Thompson, 156 S.W. 64, 170 Mo.App. 76.

⇐380. Actions to set aside.

⇐380(1). Grounds of action and conditions precedent.

Mo. 1858. Where a testator, by will, directed his executors to pay his debts out of his personalty, and to reserve his realty, and afterwards, on application of the executors, the court decreed the sale of the realty first, in an action to recover possession of the land on the ground of fraud in the sale, it was *held* that the mere fact that the executor neglected, in his application to the court, to read the direction in the will, does not affect him with fraud.

Overton v. Webster, 26 Mo. 332.

Mo. 1870. In an action by an heir to have a sale of the real estate of his decedent set aside for fraud, it appeared that the executor had obtained the decree for the sale by representing that the sale was necessary to pay the debts of the estate; that one of the principal creditors was a minor heir of the decedent, who had no guardian; that his claim had never been probated; and that the real estate sought to be sold, in which the minor was interested, was sure to increase in value, making it more for his interest to receive the land than to receive the proceeds to be realized by an immediate sale. It also appeared that the executor had purchased a large part of the other debts against the estate at a large discount. *Held*, that the facts were sufficient to show that the decree was obtained by fraud, entitling the heir to have the sale made thereunder set aside.

Hull v. Voorhis, 45 Mo. 555.

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Mo.App. 1944. Where judgment debtor's interest in land had been sold in probate proceedings after the lien of the judgment had expired but before lien was revived, judgment creditor had no right to set aside proceedings for purpose of subjecting land to the lien of the judgment.

Jones v. Bradley, 176 S.W.2d 72.

⇐380 (1½). Nature and form of remedy.

Mo. 1856. If a sale by an administrator is void, the heirs, creditors, and others seeking to annul it may so treat it, and do not require, and are not therefore entitled to, equitable relief.

Bank of Missouri v. White, 23 Mo. 342, 66 Am.Dec. 671.

⇐380 (2). Jurisdiction, limitations, and laches.

Mo. 1838. Under the Spanish laws, an administrator's sale in Missouri could not be attacked after four years.

McNair v. Hunt, 5 Mo. 300.

Mo. 1891. Though the sale of land of a decedent to pay debts may have been irregular, if the heir waits until after the debts have become barred by the statute of limitations, and another sale impossible, before he assails it, and then fails to show when and how he first learned of the irregularities, his claim is stale, and a court of equity will not entertain it.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53.

Mo. 1945. An executor who wrongfully purchased at his own sale and concealed the fact from court and from a claimant until estate had closed, term adjourned, and time for exceptions and appeal had expired, could not make defense of laches in claimant's suit to set aside the deed.

Wortham v. Marten, 188 S.W.2d 11, 354 Mo. 1.

⇐380 (2½). Parties.

For cases from other jurisdictions, see other Key Number Digests.

⇐380 (3). Pleading and evidence.

Mo. 1838. Though the records do not show on their face that it was proved that personalty was exhausted before the sale of real estate was ordered in the course of administration, it is nevertheless a legal presumption that such was the fact, and that the judge acted in accordance with law in ordering the sale.

McNair v. Hunt, 5 Mo. 300.

Mo. 1890. Where the administrator was one of the justices of the court that approved the sale, but the other two had no interest in it, and the law then in force, St. 1835, p. 159, § 39, prohibited a justice from sitting to determine any cause in which he is interested, it will be presumed, in an action of ejectment against the execution purchaser, that he did not participate in such approval.

Price v. Springfield Real-Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

Where the administrator purchased at the sale, and the law as it then stood allowed a purchase by him only on his paying at least three-fourths of the appraised value of the land, it will be presumed, in an action of ejectment against the execution purchaser, in the absence of proof to the contrary, that he paid the necessary sum.

Price v. Springfield Real-Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

Where defendant in ejectment produces in support of his title an order of the county court for the sale of lands belonging to the estate of an intestate, an order approving the sale, and a deed in pursuance thereof, it will be presumed that all the necessary proceedings antecedent to such sale were had.

Price v. Springfield Real-Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

Mo. 1890. After great lapse of time, and in the absence of something in the record showing the contrary, the presumption will arise from an order of sale and deed, and approval of the sale, that all requisite antecedent steps were taken.

Agan v. Shannon, 15 S.W. 757, 103 Mo. 661.

Mo. 1891. A judgment of the probate court is entitled to the same presumption of validity as judgments of courts of general jurisdiction, and it is not essential to the validity of a probate sale, as against a homestead right, that the record of the probate court should show that the sale was made for an antecedent debt.

Murphy v. De France, 15 S.W. 949, 105 Mo. 53, affirmed 16 S.W. 861, 105 Mo. 53, overruling Daudt v. Harmon, 16 Mo.App. 203.

Mo. 1901. Where there is no substantial evidence to sustain charges of fraud by the purchasers of land at an administrator's sale, and the inadequacy of the price is not sufficient to justify setting the sale aside, the sale should be sustained.

Keene v. Wyatt, 60 S.W. 1037, 160 Mo. 1, affirmed 63 S.W. 116, 160 Mo. 1.

Mo. 1911. Where, in a suit to set aside an administratrix's deed to certain land belonging to the estate sold to pay debts, certain of the heirs residing in the county testified that they had never been served with notice of the administratrix's application, defendant, to rebut such testimony, was entitled to prove by the sheriff, after showing that diligent and unavailing search for the papers showing a return of service of notices by him on all the plaintiffs or their representatives who lived in the county, the contents, in substance, of the process served by him.

Thompson v. Pinnell, 141 S.W. 605, 237 Mo. 545.

Mo. 1917. Where record merely failed to recite service on residents of county in proceeding for sale of property of estate, persons attacking sale had burden of showing that there was no service by clear, cogent, and convincing evidence.

Thompson v. Pinnell, 199 S.W. 1011.

Where judicial sale of property of estate is made for payment of debts at much more than three-fourths of the appraised value, when some of the heirs knew of the sale and made no complaint, clear and convincing proof is required to invalidate the sale.

Thompson v. Pinnell, 199 S.W. 1011.

Mo. 1945. Evidence warranted decree setting aside deed executed by executor to a claimant against the estate, a quitclaim deed from claimant to third party, and a quitclaim deed from third party to executor individually on ground that purported sale by executor to claimant was in fact an indirect sale to executor himself, and hence void under statute, and that fraud was the very act of obtaining court's approval of sale. Mo.R.S.A. § 161, V.A.M.S. § 463.300.

Wortham v. Marten, 188 S.W.2d 11, 354 Mo. 1.

Mo.App. 1932. Petition in equity to set aside order of probate court granting order to sell testator's property at private sale and to compel accounting *held* not to state cause of action. Rev.St.1929, § 1099, V.A.M.S. § 511.260.

Curlee Clothing Co. v. Boxer, 51 S.W.2d 894.

⇐380(4). Trial, judgment, and review.

For cases from other jurisdictions, see other Key Number Digests.

⇐381. Effect of setting aside.

Mo. 1889. The purchaser of land at administrator's sale brought ejectment against those claiming adversely to the estate and himself, and recovered. Pending the ejectment the heirs sued to set aside the administrator's sale, and a decree accordingly was rendered and affirmed in the Supreme Court; but, before affirmance, an appeal taken in the ejectment by defendants therein was dismissed at their request. *Held* that the decree and affirmance in the suit by the heirs vested in them all the rights of the purchaser at administrator's sale and that any act of purchaser to the ejectment available to the purchaser to defeat their title by adverse possession was available to the heirs.

Mabary v. Dollarhide, 11 S.W. 611, 98 Mo. 198, 14 Am.St.Rep. 639.

⇐382. Resale on setting aside.

For cases from other jurisdictions, see other Key Number Digests.

⇐383. Collateral attack.

C.C.A.Mo. 1948. Counterclaim which charged that executor of decedent's estate appointed in Illinois colluded with defendant's brothers to assist them to obtain corporate stock out of decedent's estate in such a manner as to deprive defendant of her beneficial interest under will by securing authority to sell stocks at public sale without having appraisal made constituted improper "collateral attack" on order of probate court confirming the sale, and did not give rise to general cause of action in defendant's favor under Illinois law. S.H.A. ch. 3, §§ 459, 460.

Turner v. Alton Banking & Trust Co., 166 F.2d 305.

Under Illinois law, where sale of assets has been authorized and approved by probate court with proper jurisdiction over subject matter and person, any attempt by beneficiary of estate to bring a plenary action against executor or administrator in another court for having negligently or fraudulently sold such assets for less than their fair and realizable value is a "collateral attack" upon probate court's order and cannot be maintained. S.H.A. ch. 3, §§ 459, 460.

Turner v. Alton Banking & Trust Co., 166 F.2d 305.

Mo. 1838. A want of sufficient notice of a sale by an administrator renders the sale voidable only, and not void; and such sale cannot be attacked collaterally.

McNair v. Hunt, 5 Mo. 300.

Mo. 1848. Under Rev.Code 1835, p. 52, art. 3, prescribing the procedure for the sale of real estate of a deceased person to pay his debts, where the sale is not made in conformity with the requisitions of the statute, it may be attacked in a proceeding to enjoin

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a judgment obtained on a note given for the purchase money.

Jarvis v. Russick, 12 Mo. 63.

Mo. 1865. An administrator's deed, which forms part of the chain of title of plaintiff in ejectment, cannot be impeached by defendant.

Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152.

Mo. 1873. An order of a probate court having jurisdiction of the parties and the subject-matter, approving a sale of land by the administrator, is not subject to collateral attack.

Tutt v. Boyer, 51 Mo. 425, affirmed 51 Mo. 431.

Mo. 1874. Irregularities in an administrator's sale will not be impeached collaterally, especially where, after final settlement, he has, in his personal capacity, made a deed correcting the mistakes.

Rugle v. Webster, 55 Mo. 246.

Mo. 1876. Where one appointed administratrix in common with an administrator never, so far as the record shows, took any part in probate proceedings, it will be presumed, in ejectment against the purchaser at the administrator's sale of lands to pay debts, that some sufficient cause occasioned such entire absence of her name from the record, so that the petition for the sale, signed by the administrator alone, will be held sufficient to authorize an order for a sale.

Grayson v. Weddle, 63 Mo. 523.

Where an order for the sale of a decedent's land has been once renewed, a misrecital as to the date of the renewed order in the administrator's report is not a fatal error, rendering the sale subject to collateral attack.

Mo. 1893. Macey v. Stark, 21 S.W. 1088, 116 Mo. 481.

Mo. 1893. Macey v. Pitillo, 21 S.W. 1094.

Mo. 1894. The sale of real estate by an administrator or executor, without having it appraised as directed by Rev.St.1879, § 162, Rev.St.1889, § 161, V.A.M.S. § 463.270, is an irregularity for which the sale may be set aside in a direct proceeding for that purpose, but does not render the sale void in a collateral proceeding after confirmation by the probate court.

Noland v. Barrett, 26 S.W. 692, 122 Mo. 181, 43 Am.St.Rep. 572.

Mo. 1894. The failure of the record, in a proceeding to sell a decedent's lands to pay debts, to show that the posting of notice of sale was not dispensed with by order of court, will not render the sale void on collateral attack.

Melton v. Fitch, 28 S.W. 612, 125 Mo. 281.

An administrator's sale duly approved and unappealed from cannot be collaterally attacked.

Mo. 1894. Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1910. Blickensderfer v. Hanna, 132 S.W. 678, 231 Mo. 93.

Mo. 1912. Higbee v. Billick, 148 S.W. 879, 244 Mo. 411.

Mo. 1905. The validity of proceedings in the probate court for the sale of a decedent's land may be attacked in a collateral action to quiet title where the record of those proceedings shows that the court was without jurisdiction because the application for the sale therein was not made by a "creditor or other person interested in the estate," as required by Rev.St.1899, § 150, V.A.M.S. § 463.190.

Stark v. Kirchgraber, 85 S.W. 868, 186 Mo. 633, 105 Am.St.Rep. 629.

Mo. 1910. Where the probate court acquired jurisdiction over the real estate of a decedent by the filing of a petition by the administrator for the sale thereof to pay debts, the mere fact that the administrator sold the land at private sale for less than three-fourths of its appraised value in violation of Rev.St.1879, § 166, did not affect the jurisdiction of the probate court, and its erroneous judgment approving the sale was not void, and could not be collaterally attacked.

Smith v. Black, 132 S.W. 1129, 231 Mo. 681.

Mo. 1921. Under Rev.St.1909, § 6708, V.A.M.S. § 513.495, providing that the homestead shall continue for the benefit of the widow and children without being subject to the payment of debts not legally charged thereon in the decedent's lifetime, until the youngest child attains majority and until the death of the widow, where the probate court attempted to sell the homestead for debts not charged thereon in the decedent's lifetime, it had no jurisdiction over the subject-matter, and the sale was an absolute nullity and void upon collateral attack.

Dennis v. Gorman, 233 S.W. 50, 289 Mo. 1.

Mo.App. 1932. Action to compel administratrix to pay taxes on intestate's realty privately sold to plaintiff, as per contract, was not collateral attack on judgment approving sale, nor attack after term.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

For references to other topics, see Descriptive-Word Index

Collateral attack on judgment approving administratrix' sale of intestate's realty and attack after term are not allowable.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

⇐384. Operation and effect in general.

Mo. 1898. Where an order of sale of decedent's land by the probate court, order approving the sale, and the deed from the clerk of that court, are exhibited, it will be presumed, until the contrary is shown, that all antecedent steps requisite to the sale were taken.

Young v. Downey, 46 S.W. 1086, 145 Mo. 250, 68 Am.St.Rep. 568.

Mo. 1914. Where the record of entry approving the report of sale by an administrator does not show to whom the sale was made or describe the land, but a deed was made conveying the land which could have been sold, it will be presumed that the report showed that the grantee purchased the land which was conveyed to her.

Hicks v. Watson, 167 S.W. 533, 258 Mo. 425.

⇐385. Effect on rights of creditors.

For cases from other jurisdictions, see other Key Number Digests.

⇐386. Rights of devisees and heirs.

Mo. 1891. An attorney who, representing both the administrator and the creditors, agrees that, if the order of sale is not resisted, he will make the land bring $1,000, to be credited on the debts of the estate, is not accountable to the heirs because he bids only $100 for the land, when it appears that the debts amounted to more than $2,000, as the heirs would not have received any of the money had $1,000 been bid, and they were not therefore injured.

Murphy v. De France, 16 S.W. 861, 105 Mo. 53, affirming 15 S.W. 949, 105 Mo. 53.

Mo. 1894. Purchasers of land at administrator's sale agreed with the administrators to resell at any time within a year for the same price, with interest, and on receipt of such amount made a deed to the administrators. The repurchase was reported to the court, which, debts being still unpaid, ordered the sale of this and other land. The administrators sold and gave their warranty deed to one who had notice of their trust. It appeared that the whole transaction had been for the benefit of the estate, and that the full price received was accounted for. *Held* that, the estate having received all the benefits of the transaction and the heirs having received part of the proceeds of the sale, the heirs should not be allowed to redeem from the grantee after 15 years.

Stowe v. Banks, 27 S.W. 347, 123 Mo. 672.

Mo. 1912. An heir, as such, cannot set aside a regular administrator's sale of land, the recitals in the deed of which are, under Rev.St.1909, §§ 173, 176, V.A.M.S. §§ 463.350, 463.360, prima facie true.

Higbee v. Billick, 148 S.W. 879, 244 Mo. 411.

⇐387. Rights of surviving husband or wife, or their successors in interest.

Mo. 1854. Under Code 1825, p. 333, § 1, an administration sale for the payment of debts bars the widow's dower in the property so disposed of.

Mount v. Valle, 19 Mo. 621.

Mo. 1901. Where an executor sold the land of his testatrix, under an order of the probate court, to pay debts, the rights of the husband of the deceased as tenant by the curtesy are not affected by the fact that one of the debts proved against the estate, and satisfied with the proceeds of the sale, was secured by a deed of trust of the land, since such trust deed would affect such right only when the land was sold under the deed.

Casler v. Gray, 60 S.W. 1032, 159 Mo. 588.

Mo. 1947. Probate court had jurisdiction to order sale of land, which was not part of deceased's homestead, without first appointing commissioners in accordance with statute providing that commissioner appointed to set out homestead shall, where right of dower exists, also set out dower, since the statute applies only where the property occupied as a homestead is to be sold and it exceeds in value or in area that fixed by the homestead law. Mo.R.S.A. § 614, V.A.M.S. § 513.505.

Brune v. Rathbun, 204 S.W.2d 705.

⇐388. Title and rights of purchasers and their privies.

⇐388(1). In general.

C.C.A.Mo. 1916. An administrator, authorized to sell land to pay judgments of creditors who had obtained a decree setting aside a fraudulent conveyance of the land by decedent in his lifetime, *held* to convey a good title as against the fraudulent grantee.

Byrd v. Hall, 227 F. 537, 142 C.C.A. 169, affirming 211 F. 182.

Mo. 1875. An owner conveyed land to a purchaser. The purchaser obtained a bond

for title, and died without paying any portion of the purchase price. Plaintiff purchased the premises at a sale of the administrator of the deceased purchaser, and received a conveyance therefor from the administrator. Thereafter defendant, with knowledge of the facts, acquired a deed from one claiming under the will of the deceased owner, and paid to his grantor the purchase price. Defendant purchased under the understanding that he should pay to the administrator the amount bid by plaintiff at the administrator's sale. *Held* that, on plaintiff paying to defendant the amount defendant paid to his grantor, plaintiff was entitled to a decree directing defendant to make a conveyance to plaintiff.

Bibb v. Means, 61 Mo. 284.

Mo. 1878. If a public administrator, after a sale of land and the approval thereof and the delivery of the deed, saw fit on the representations of the purchaser to remit a part of the purchase price, that would not devest the title already vested.

Long v. Joplin Mining & Smelting Co., 68 Mo. 422.

Mo. 1878. Where an administrator's report of sale did not contain a particular description of a certain parcel, but embraced it by general terms, so as to have authorized the administrator to convey said tract by particular description in a deed, but the deed followed the general terms of the report, and was insufficient to convey legal title, the purchaser, having paid an amount almost equal to the appraised value, acquired rights which a court of equity would enforce.

Gilbert v. Cooksey, 69 Mo. 42.

Mo. 1892. Rev.St.1889, § 171, V.A.M.S. § 463.360, provides that on an administrator's sale of land to pay debts of decedent the deed shall convey "all the right, title, and interest the deceased had in such real estate, at the time of his death." Section 2734, § 523.010, relating to condemnation proceedings, provides that each known owner of land sought to be taken shall be made a party. *Held*, in ejectment, that title to land acquired under condemnation proceedings against the heirs of a deceased intestate would prevail over that acquired at a subsequent administrator's sale for the payment of decedent's debts.

Kane v. Kansas City, F. S. & M. Ry. Co., 20 S.W. 532, 112 Mo. 34.

Mo. 1902. Where the entire tract of land purchased at an administrator's sale was exempt to the widow and minor children as homestead, the purchaser at the sale was not entitled to have the homestead exemption set off by appraisers, as provided by Rev.St.1899, § 3624, V.A.M.S. § 513.520.

Houf v. Brown, 71 S.W. 125, 171 Mo. 207.

Mo. 1909. As under V.A.M.S.Const. art. 6, §§ 34, 35, Ann.St.1906, pp. 238, 239, providing for the establishment of a probate court in every county with jurisdiction over all probate business, etc., and Rev.St.1879, c. 1, substantially re-enacted in Rev.St.1899, c. 1, §§ 1–322, Ann.St.1906, pp. 337–458, V.A.M.S. § 461.130, relating to the jurisdiction of the probate court, that court has exclusive jurisdiction in all cases arising under the general law relating to the administration of estates and to all matters pertaining to probate business and has exclusive jurisdiction to order a sale of decedent's real estate to pay debts, the order of the circuit court to sell the real estate of a defendant to pay the debts is void, and the purchaser at such sale acquires no title.

Scott v. Royston, 123 S.W. 454, 223 Mo. 568.

Mo.App. 1894. The sale of land by an administrator to pay debts is equivalent to a sale made by the heir.

Page v. Culver, 55 Mo.App. 606.

⇐388(2). What passes by sale in general.

Mo. 1862. The deed of the administrator upon a sale of the land of a decedent under order of a probate court does not pass any of the personal rights of the administrator to the land sold, but only the interest of the decedent.

Dickerson v. Campbell, 32 Mo. 544.

Mo. 1912. A purchaser at an administrator's sale is a purchaser at a judicial sale strictly defined, and he does not take subject to equities.

Higbee v. Billick, 148 S.W. 879, 244 Mo. 411.

Mo. 1913. An executor conveyed estate land to his son with the understanding that the son was to later reconvey to him. The son did not pay, nor agree to pay, anything for the land, but the purchase price was paid by the executor. The deed, because of a misdescription, did not convey the legal title. *Held*, that as the son did not pay, or promise to pay anything for the land he had no equitable interest in the same.

Gilmore v. Thomas, 158 S.W. 577, 252 Mo. 147.

Mo. 1946. Where commissioners in admeasuring dower to widow did not intend to limit admeasurement of dower to designated acreage which would run through residence given to widow, misconstruction of commis-

sioners' report by executor causing him to advertise all of the land for sale to pay debts and execution of deed purporting to convey such land did not reduce widow's dower.

Huffman v. Benitez, 196 S.W.2d 856, 355 Mo. 556.

⇐388 (3). Rents, profits, crops, and timber.

Mo.App. 1894. The sale of land by the administrator passes to the purchaser all the title of the heirs, including their share of the crops reserved for rent, without reference to the condition of the crops.

Page v. Culver, 55 Mo.App. 606.

⇐388(4). Caveat emptor and warranty.

The rule of caveat emptor applies to administration sales.

Mo. 1886. Estes v. Alexander, 2 S.W. 414, 90 Mo. 453.

Mo. 1894. Throckmorton v. Pence, 25 S. W. 843, 121 Mo. 50.

Mo.App. 1901. Foley v. Boulware, 86 Mo.App. 674.

Mo. 1862. Pending a personal suit by the administrator of an estate against the widow and heirs in the circuit court for a conveyance of land under contract with the intestate, the clerk of the circuit court, as a creditor of the estate, filed a petition for a sale of the intestate's land, and at the administrator's sale became the purchaser of the land, for the conveyance of which the pending suit was brought; the administrator announcing at the sale his claim thereto. *Held*, that the purchaser, being clerk of the court in which the suit for specific performance was pending, was thereby charged with full notice of the nature of the administrator's claim to the land.

Dickerson v. Campbell, 32 Mo. 544.

Mo.App. 1943. Rule of "caveat emptor" applies to sales to pay debts under orders of probate court and purchaser takes subject to defects, liens and encumbrances. Mo.R. S.A. § 141, V.A.M.S. § 463.170.

In re Claus' Estate, 167 S.W.2d 372.

⇐388 (5). Bona fide purchasers.

Mo. 1850. The title of a bona fide purchaser of a slave from an administrator who had a right to sell the same is not affected by the fraudulent acts of the administrator as to the estate of the intestate.

Pipkin v. Casey, 13 Mo. 347.

Mo. 1912. A purchaser of real estate at an administrator's sale must take notice of the record title.

Higbee v. Billick, 148 S.W. 879, 244 Mo. 411.

Mo. 1919. In view of Rev.St.1909, §§ 555, 557, V.A.M.S. §§ 468.580, 468.600, purchaser of realty from executor, like purchaser from devisee, is bound to take notice will does not become finally binding and operate until expiration of time of filing suit to contest, and is bound to take notice of action filed in circuit court within that time, revoking the probate and the letters of the executor.

Johnson v. Brewn, 210 S.W. 55, 277 Mo. 392.

Purchaser of decedent's land from executor, who took with constructive notice of contest of decedent's will pending in circuit court and of want of jurisdiction in probate court to order sale on account of the filing of contest, that fact having been ascertainable by examination of records of circuit court, acquired no title.

Johnson v. Brewn, 210 S.W. 55, 277 Mo. 392.

⇐388(6). Remedies.

Mo. 1855. Under Acts 1853, p. 90, Rev. Code 1845, pp. 38-50, giving the St. Louis land court jurisdiction of actions for the recovery of real property, it has jurisdiction of an action by a purchaser of lands at an administrator's sale to compel the administrator to make a deed of such lands.

Speck v. Wohlien, 22 Mo. 310.

Mo. 1883. Defendant, buying land at a sale by an executor, and acquiring possession and claiming title thereunder, could not, when sued for the purchase money, set up a failure to comply with the order of the court authorizing the sale.

Adair v. Adair, 78 Mo. 630.

Mo. 1890. Where the administrator's sale occurred nearly 43 years before suit was brought, even if the law required a recital in the deed of the time and place of sale, the recital in the deed showing a sale by an administrator of certain land in connection with the judgment of approval of the sale, and the fact that the county court was in session on September 18, 1841, which was after the order of sale and before the filing of the report, it would be presumed that the recital in the deed of September 11, 1841, when the court was not in session, as the date of sale, was a clerical mistake.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St. Rep. 595.

Where an administrator's sale was made nearly 43 years before the commencement of a suit, and the plaintiff and those from whom he claimed have never had the actual possession, and during that time the persons

For later cases see same Topic and Key Number in Pocket Parts

claiming under the administrator's deed have paid the taxes, and have for 20 years before the commencement of the suit exercised open acts of ownership over it, it must be presumed that the administrator performed his duties until the contrary is made to appear.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St. Rep. 595.

⇐388(7). When title passes.

Mo. 1908. The administrator's right to sell land, where the personalty is insufficient to satisfy the debts, relates back to intestate's death, and a sale of the land for that purpose, pursuant to an order of court, and the execution of a deed to the purchaser, passes title as against the heirs; but title remains in the heirs until such steps are taken.

Grant v. Hathaway, 114 S.W. 609, 215 Mo. 141, 15 Ann.Cas. 567.

⇐389. Rights and remedies of purchasers on avoidance of sale.

Mo. 1855. Where A. bought at an administrator's sale a tract of land which was subject to the lien of B. for the purchase money, and B. afterwards brought a suit against A. to enforce the lien, when a sale was decreed, and the purchase money was ordered to be applied to the satisfaction of the lien, it was *held* that A. had no right to receive first what he had paid to the administrator.

Delassus v. Poston, 21 Mo. 543.

Mo. 1878. On a sale of land by an administrator for the purpose of paying debts, a judgment creditor purchased the land; but it subsequently developed that the sale was void, and the heir of deceased brought ejectment for the land. *Held*, that the purchaser stood as any other purchaser would, and was entitled to receive his purchase money and interest, but not the amount of his judgment, with the interest called for by the judgment.

Mobley v. Nave, 67 Mo. 546.

Mo. 1882. In ejectment, defendant claimed title through an administrator's sale, and prayed that, if the court should decide that defendant did not have the legal title, he should be adjudged to have an equitable defense to the extent of the purchase money and taxes paid and interest on the same. The court adjudged that plaintiff had the legal title. The plaintiff was the heir of the intestate. *Held*, that plaintiff was not entitled to recover, unless he reimbursed the defendant for the purchase money and taxes paid.

Schafer v. Causey, 76 Mo. 365.

Mo. 1891. In a suit in ejectment brought by the holder of the legal title against a purchaser at an administrator's sale who gained no title owing to the misdescription of the land in the notice of sale, defendant has a clear equity to be reimbursed for his payment of the purchase money, which went in extinguishment of the debts of the estate and for taxes paid and improvements made in good faith, and until thus reimbursed the plaintiff cannot recover the land.

Cunningham v. Anderson, 17 S.W. 972, 107 Mo. 371, 28 Am.St.Rep. 417.

Mo. 1894. An heir, who sues to recover land belonging to the ancestor and sold for the payment of his debts, must, in order to recover because of the invalidity of the sale, refund to the purchaser the money paid by him therefor, and which went to pay the debts of the ancestor.

Throckmorton v. Pence, 25 S.W. 843, 121 Mo. 50.

Mo. 1928. Decedent's heirs bringing ejectment against subsequent purchaser of homestead under void administrator's sale *held* not liable to defendant for purchase money paid to administrator. Rev.St.1919, § 5857, V.A.M.S. § 513.495.

Johnson v. Adams, 7 S.W.2d 1010.

Mo. 1936. Under statute, grantee of vendor purchasing land at void administrator's sale could recover compensation from heirs of deceased in whom were decreed fee-simple title, for good-faith improvements made while in possession of land, notwithstanding that there was no decree of dispossession, provided occupying claimant surrendered possession of land within reasonable time. Mo.St.Ann. §§ 1384, 1385, pp. 1601, 1605, V.A.M.S. §§ 524.160, 524.170.

Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

Grantee of widow purchasing land at void administrator's sale *held* entitled to interest on sum at which land was appraised at time of administrators' sale, which did not include first mortgage or widow's dower, from date of approval of administrator's sale, where dower had not been admeasured and grantee had paid interest on first mortgage and taxes on land. Mo.St.Ann. §§ 321, 338, pp. 207, 224, V.A.M.S. §§ 524.160, 524.170.

Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

Mo. 1941. Where probate court was without jurisdiction to order and approve sale of intestate's realty, it was not equitable for administrator to retain proceeds from

sale and such proceeds were to be refunded to proper party.

Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95.

Mo.App. 1879. A contention that plaintiff heirs ought not to be compelled to refund taxes paid by a purchaser at a void administrator's sale as a condition of recovery of the property, since the payment was voluntary, is without merit, since the payment of the taxes was a removal of an incumbrance on the land.

Schaefer v. Causey, 8 Mo.App. 142.

A purchaser at a void administrator's sale may set up as an equitable defense, in ejectment by the heirs, the right to have refunded the purchase money paid; and the fact that plaintiffs were minors at the time of sale is immaterial.

Schaefer v. Causey, 8 Mo.App. 142.

Where a purchaser at a void administrator's sale has a right to set up as an equitable defense, in ejectment by the heirs, his right to have refunded the purchase money paid, a claim that the defense is stale is without merit, since defendants could not defend until they were attacked, and the defense, if good at any time, was always good while a right of action remained in any of the plaintiffs.

Schaefer v. Causey, 8 Mo.App. 142.

Mo.App. 1904. An innocent purchaser of land at an administration sale, without notice of any infirmity in his title, is entitled to remuneration for the added value of permanent improvements, for taxes paid, and the price, when the same has been applied to extinguish a charge against the land, before he can be compelled to restore it to the heirs on the sale being declared void.

Patillo v. Martin, 83 S.W. 1010, 107 Mo. App. 653.

Mo.App. 1943. Where purchase price of land sold by administrator without authority was used to pay costs of administration claims, and claims would have gone unpaid for lack of funds but for purchaser's money, land could not be subjected to sale for repayment of purchase price in absence of statutory provision therefor.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

Where Supreme Court ordered administrator who sold real estate without power to do so to refund purchase price and administrator had expended portion of purchase price in payment of administration charges, judgment of trial court ordering real estate to be held under lien for payment of purchase price and to be sold to satisfy lien was erroneous.

Linville v. Ripley, 173 S.W.2d 687, 237 Mo.App. 1275.

⇐390. Liabilities of purchasers.

For cases from other jurisdictions, see other Key Number Digests.

⇐391. Liabilities of executor or administrator.

Mo. 1872. An administrator who postpones a sale ordered by the probate court, unless for sound reasons, is responsible for any loss which may happen to the estate by reason of such delay.

In re Gorman's Estate, 50 Mo. 179.

Mo. 1872. Where an administrator sold the title of decedent as owner in fee simple of certain lands to pay debts, as provided by the statute, he cannot, in his final settlement, be compelled to debit himself with that portion of the proceeds paid to a creditor whose claims had already been secured by deed of trust on the land sold.

Welton v. Hull, 50 Mo. 296.

Mo. 1895. Where an administrator, authorized by the probate court to sell notes for their face value with accrued interest, sold them for less, and the makers were solvent, and subsequently paid the face value with interest, the administrator should be charged with the full amount of the principal and interest notes.

In re Glover, 29 S.W. 982, 127 Mo. 153.

Mo. 1902. Where lands were sold by an administrator, and bought by him at more than the appraised value, and the sale was duly approved by the court, the fact that some time thereafter he sold the lands at an increased price to a person whom he did not know at the time of the purchase is insufficient to charge him, as trustee for the heirs, for the price so received, no unfair advantage on the part of the administrator being shown.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

⇐392. Liabilities on bonds for sale.

For cases from other jurisdictions, see other Key Number Digests.

(D) CONVEYANCE.

⇐393. Necessity and nature in general.

Mo. 1853. No title passes by an administration sale unless a deed is executed.

Wohlien v. Speck, 18 Mo. 561.

Mo. 1875. A deed executed by an administrator, which recites that the sale was

made on a designated date, while his report of the sale shows that it was made on a prior date is not fatally defective.

Garner v. Tucker, 61 Mo. 427.

Mo. 1878. The purchaser at an administration sale acquired, upon the approval of the sale and the payment of the purchase money, an equitable title to the premises sold, though no deed had been made.

Long v. Joplin Mining & Smelting Co., 68 Mo. 422.

Mo. 1880. In ejectment by the heirs of a decedent, defendant claimed through the purchaser of the land at an administrator's sale for the payment of the debts of the decedent. The administrator's deed was defective, because it bore no seal. *Held* that, though the deed was defective, the facts proved constituted an equitable defense.

Snider v. Coleman, 72 Mo. 568.

Mo. 1883. Where the proceeds of land sold at administrator's sale are applied to the payment of debts, the assignee of the purchaser may compel the correction of a misdescription in the deed.

Grayson v. Weddle, 80 Mo. 39.

Mo. 1891. Where the records of the probate court show that the administrator was ordered to sell the land to pay debts, that he made the sale, that his report of sale was approved, and that he was ordered to make a deed to the purchaser, which was not done, the purchaser has the equitable title, which will be enforced in equity against the heirs.

Sherwood v. Baker, 16 S.W. 938, 105 Mo. 472, 24 Am.St.Rep. 399.

⇐394. Authority to make.

Mo. 1858. Under Act July 4, 1807, (1 Ter.Laws, p. 138), where an intestate's personalty is insufficient to pay his debts, his administrator may "sell and convey" his real estate therefor. The administrator, in the case of such sale, is authorized to make a deed to a purchaser.

Blair v. Marks, 27 Mo. 579.

Mo. 1874. An administrator, after the expiration of his term, may cure informalities by giving a new administrator's deed.

Rugle v. Webster, 55 Mo. 246.

Mo. 1875. The estate of an intestate in the hands of a public administrator for administration is in the charge of the public administrator until fully administered, or until he is discharged in the ordinary course of law as other administrators, as prescribed by Wag.St. p. 122, § 12; and therefore, as long as such public administrator has funds in his hands, and there is nothing to show that he was ever discharged by the probate court, he has authority to make a deed conveying land.

Garner v. Tucker, 61 Mo. 427.

Mo. 1877. 1 Wag.St. p. 98, § 35, provides that, if the report of sale by an administrator be approved by the court, such sale shall be valid, and the administrator, or, if he be the purchaser, the clerk of the court, shall execute and deliver to the purchaser a deed referring in appropriate terms to the order of sale, and the court by which it was made, the certificate of appraisement, the advertisement, the time and place of sale, the report of the proceedings, and order of approval thereof; and section 37 provides that such deed shall be evidence of the facts therein recited. *Held* that, where an administrator's deed recited that by a proper order of record a certain person as administrator was ordered to sell the real estate, the deed itself established that such person was the administrator.

Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

Mo. 1878. The fact that an administrator had made a final settlement did not deprive him of power to make a deed of land, where the sale and approval had been made before the final settlement.

Wilkerson v. Allen, 67 Mo. 502.

Mo. 1882. An administrator's deed passes no title to land described therein and in the report of sale, when not described in the petition for sale, nor in the order of sale, nor in the order approving the sale.

Greene v. Holt, 76 Mo. 677.

Mo. 1884. The county court has, under Gen.St.1865, p. 499, § 35, power to order the clerk of that court to execute a deed in the place of an administrator who has become a joint purchaser of property of the estate.

Moore v. Ivers, 83 Mo. 29.

Mo. 1887. Where the record fails to show that an administrator regularly appointed has either resigned, made final settlement, been discharged, or had his letters revoked, he remains the administrator, with power to execute a deed for the premises sold as such under the order of the county court, though the order had previously been entered of record directing him to turn over the estate to his successor.

Warren v. Carter, 5 S.W. 42, 92 Mo. 288.

⇐395-396.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

For references to other topics, see Descriptive-Word Index

⇐397. Deed to purchaser.

Mo. 1865. Under Rev.Code 1835, p. 53, §§ 20–22, it is unnecessary that the deed of an administrator conveying land under sale by order of court should recite the fact of the report of sale and its approval.

Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152.

A deed of an administrator, conveying the land of the decedent under a sale made by the order of the probate court, reciting the order of sale and the sale, would be prima facie evidence of title, and it rests on the party controverting the effect of the deed to prove affirmatively that the sale was not approved.

Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152.

Mo. 1874. Where the description of lands in an administrator's sale and conveyance is so indefinite that the land sold cannot be located therefrom, and does not indicate means by which it may be fully identified, such sale and conveyance are void.

Jones v. Carter, 56 Mo. 403.

Mo. 1878. It appearing that a deed conveying the land in question was executed by the public administrator, and that the purchase money was paid, it must be presumed that the deed was delivered to the purchaser, as that would be the usual course of business, and as it would be the duty of the administrator to so deliver it.

Long v. Joplin Mining & Smelting Co., 68 Mo. 422.

Mo. 1884. An administrator's deed, which was not acknowledged in open court as required by Rev.St.1845, p. 89, § 40, is insufficient to convey title.

Campbell v. Laclede Gaslight Co., 84 Mo. 352, affirmed 119 U.S. 445, 7 S.Ct. 278, 30 L.Ed. 459.

An administrator's deed properly executed and acknowledged, which contains the recitals required by law, is evidence of the facts therein stated.

Mo. 1886. Camden v. Plain, 4 S.W. 86, 91 Mo. 117.

Mo. 1912. Howell v. Sherwood, 147 S. W. 810, 242 Mo. 513.

Mo. 1886. A deed by an administrator, properly executed and acknowledged, and containing all the recitals required to be made by law, has the effect to convey to the purchaser the right, title, and interest of the deceased, under Gen.St.1865, c. 122, §§ 35, 37.

Camden v. Plain, 4 S.W. 86, 91 Mo. 117.

Mo. 1890. An order approving an administrator's sale, in the absence of the report of sale, is better evidence that the sale was made at the proper time and place than any contrary recital in the clerk's deed, as the law does not require him to state the time and place of the sale, and the recital may be disregarded.

Price v. Springfield Real Estate Ass'n, 14 S.W. 57, 101 Mo. 107, 20 Am.St.Rep. 595.

Mo. 1890. The statutes of 1835 relating to the sale of land by an administrator do not, like the statutes of 1845 relating to the same subject, make the deed of the administrator evidence of matters stated therein; but the statutes of 1835 require the administrator to report the sale to the court, with the certificate of appraisement and a copy of the advertisement, and the report must be approved by the court. *Held*, that the approval is in effect a judgment that the sale has been conducted according to law and the order of the court, and it is not incumbent upon one claiming under the deed to produce any evidence additional to the deed and the order approving the sale.

Hughes v. Sloan, 14 S.W. 660, 15 S.W. 756, 102 Mo. 77.

Where the deed of an administrator shows the date of the order of sale, the court by which the order was made, and the consideration, it is a sufficient compliance with Laws 1835, art. 3, § 22.

Hughes v. Sloan, 14 S.W. 660, 15 S.W. 756, 102 Mo. 77.

An administrator's sale of land made in 1841 is governed by Laws 1835, and not by Rev.St.1845, and the deed, made in pursuance of such sale, which recites the date of the order of sale, the court by which the order was made, and the consideration, as required by Rev.St.1835, art. 3, § 22, is admissible, in ejectment, as evidence of the purchaser's title, though it does not show whether the sale was public or private, whether it was made during the session of any court, whether a report of the sale was made and approved, or whether the property was advertised for sale.

Hughes v. Sloan, 14 S.W. 660, 15 S.W. 756, 102 Mo. 77.

Mo. 1890. Rev.St.1855, p. 147, § 35, Rev. St.1889, § 168, V.A.M.S. § 463.350, providing that a deed of land of a decedent, sold by the administrator under an order of court, is sufficient as to the description, if it refers in apt and appropriate terms to the order of sale, certificate, and appraisement, etc., where the administrator's deed refers to the order of sale, etc., and also contains a description of the property, which varies from that contained in such order, the description in the

deed will be controlled by that in the order.

Agan v. Shannon, 15 S.W. 757, 103 Mo. 661.

Land of a decedent, ordered to be sold by the administrator for debts, was described in the proceedings as the "S. E. ¼ of the N. W. ¼ of the N. E. ¼ of the S. W. ¼, of S. 25, T. 25, R. 29." The administrator reported that he had made the sale "in pursuance of an order of said court," describing the land in his report and deed as the "S. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. W. ¼," of said section. *Held*, that it would be presumed that the administrator sold the land described in the order of sale, and that the different description was a clerical mistake.

Agan v. Shannon, 15 S.W. 757, 103 Mo. 661.

Mo. 1893. Where an administrator's deed contained two descriptions of the property to be conveyed, one true and the other false, one applicable to the land which the intestate did own, and one applicable to land which he did not own, the former will be taken as the true description, and the latter will be rejected.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

An administrator's deed of a lot, executed after the town plat had been destroyed, described the granted premises as "Lot two, block six, or the west half of block six." *Held*, that the description of the granted premises as "Lot 2" should be rejected as false, and the description as the west half of the block should be taken as the true description, on proof that lot 2 constituted the east half of the block, and that the administrator's intestate owned only the west half.

Bray v. Adams, 21 S.W. 853, 114 Mo. 486.

Mo. 1894. A clerical error in an administrator's deed as to the dates on which the notice of sale was published is not material, where the proof of publication shows that the notice was properly published.

Melton v. Fitch, 28 S.W. 612, 125 Mo. 281.

Mo. 1898. A judgment awarding dower, rendered in 1852, recited that, as the widow had become the purchaser of the real estate since her husband's death, no commissioners were required to admeasure her dower. Defendants' evidence tended to show that she had bought the land at an administrator's sale to pay debts prior to the rendering of said judgment. However, all the papers of the probate court were destroyed by fire in 1890, and the original grantee of the widow and the administrator are both dead. *Held*, that it will be presumed that the wife received a deed from the administrator at the time of her purchase.

Osborn v. Weldon, 47 S.W. 936, 146 Mo. 185.

Mo. 1910. Where an administrator petitioned the probate court for the sale of real estate to pay debts, and an order of sale was duly made, and a sale was regularly and formally had and reported to and approved by the court, and the administrator in the report of sale and in the final settlement acknowledged the receipt of the purchase price, the presumption will be indulged that the administrator performed his duty and made a deed and delivered it to the purchaser.

Pearson v. Murray, 130 S.W. 21, 230 Mo. 162.

Mo. 1911. An administratrix's deed to land sold under order of the probate court to pay debts is prima facie evidence of all the recitals therein contained, including the sale made by the probate court, in pursuance of which it was executed as provided by Rev.St. 1909, § 176, V.A.M.S. § 463.360.

Thompson v. Pinnell, 141 S.W. 605, 237 Mo. 545.

Mo. 1913. A deed of an administrator de bonis non under Rev.St.1899, § 167, V.A.M.S. § 463.330, based on a sale made by the original administrator, is void, where it does not recite a petition for such deed as provided for by such section, and where it is based on a report of sale held by the administrator de bonis non, and not by the administrator, as provided for by section 167, V.A.M.S. § 463.330.

Jackson v. Johnson, 154 S.W. 759, 248 Mo. 680.

Mo. 1913. A conveyance made by an executor under order of court cannot be construed to be his act as executor, where on its face it appeared as his individual conveyance.

Armor v. Frey, 161 S.W. 829, 253 Mo. 447.

Mo.App. 1878. Requisites and sufficiency of administrator's deed. See,

Le Bourgeoise v. McNamara, 5 Mo.App. 576, memorandum.

⇐398-399.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

(E) PROCEEDS.

⇐400. Disposition in general.

Mo.App. 1941. Where real estate of a decedent is converted into money for the

payment of debts, whatever surplus remains after proper application of the fund to the objects of the conversion retains the character of real estate for the purposes of succession or distribution, and cannot be made use of for any of the purposes of the administration except in the specific mode and for the specific objects provided by the statute. Mo.St.Ann. §§ 142, 146, 166, pp. 88, 94, 102, V.A.M.S. §§ 463.150, 463.170, 463.190.

In re Claus' Estate, 147 S.W.2d 199.

⇐401. Costs and expenses.

Mo.App. 1941. Under statute providing for sale of real estate to pay debts of intestate, as it appeared prior to amendment of 1939, the proceeds derived from such sale of real estate were not subject to be diverted to the payment of the ordinary costs and expenses of administration. Mo.St.Ann. §§ 142, 146, 166, pp. 88, 94, 102, V.A.M.S. §§ 463.150, 463.170, 463.190.

In re Claus' Estate, 147 S.W.2d 199.

Expenses necessarily incurred in connection with sale of real estate to pay debts of decedent were not ordinary "expenses of administration" within meaning of rule prohibiting the application of the proceeds of such sale of real estate to payment of ordinary costs and expenses of administration. Mo. St.Ann. §§ 142, 146, 166, pp. 88, 94, 102, V.A.M.S. §§ 463.150, 463.170, 463.190.

In re Claus' Estate, 147 S.W.2d 199.

Where real estate of decedent, who left no personal property, was sold to pay debts, administrator was entitled to credit for all reasonable charges incurred as necessary incidents to the sale of the real estate because the proceedings whereby such expenses were incurred were required by statute in order to accomplish lawful sale of the real estate. Mo. St.Ann. §§ 142, 146, 166, 221, 11782, pp. 88, 94, 102, 142, 6999, V.A.M.S. §§ 463.150, 463.170, 463.190, 465.100, 481.230, 483.580.

In re Claus' Estate, 147 S.W.2d 199.

Where real estate of decedent, who left no personal property, was sold to pay debts, the administrator would be entitled out of the proceeds of such sale to credit for disbursements shown to have been made in payment of expenses necessarily incurred in connection with such sale of real estate upon proof as to the reasonableness of the charges made. Mo.St.Ann. §§ 142, 146, 166, pp. 88, 94, 102, V.A.M.S. §§ 463.150, 463.170, 463.190.

In re Claus' Estate, 147 S.W.2d 199.

⇐402. Mortgages and other liens.

Mo. 1879. Wag.St. p. 94, §§ 2–4, 8, exclude the idea of enforcement of a vendor's lien after the death of the vendee by a sale of the land, and give a preference out of the proceeds to the vendor who holds the lien by a proceeding in the probate court. An order allowing the demand of the vendor, to the extent that it ascertained and declared the lien and required it to be first paid out of the proceeds of the sale, was a nullity, and furnished no justification to the administrator for his compliance with it.

Ross v. Julian, 70 Mo. 209.

Mo. 1883. A creditor, possessing a judgment lien against the real estate of a deceased debtor, is entitled, as against the administrator selling such real estate under order of court, to have his judgment lien first satisfied from the proceeds of the sale; and an administrator, who knows of the existence of such judgment lien, has no right to pay the proceeds of such sale to general creditors of the estate.

Bassett v. Slater, 81 Mo. 75.

⇐403. Payment of debts.

Mo. 1880. In reviewing the annual settlement of an administrator on his final settlement, it appeared that the court had allowed credits in the annual settlement for improvements, and for support of the widow of the decedent. There were no assets in the hands of the administrator, except the money derived from the sale of real estate. *Held* that, as the county court had no power to order the sale of real estate, except for the payment of debts, when it was sold for that purpose, the proceeds could not be diverted, and applied to another and different purpose, and hence the allowance of the credits in the annual settlement was improper, and subject to correction on the final settlement.

Ritchey v. Withers, 72 Mo. 556.

⇐404. Right to surplus.

Mo.App. 1906. A husband became the owner of land and occupied it with his wife as a homestead. Subsequently he left his home. His wife remained. The premises were sold for delinquent taxes, and the purchaser at the tax sale conveyed the same to the wife for life, with remainder to the husband, subject to the debts and funeral expenses of the wife. *Held*, that the husband, on the death of the wife, was entitled to the surplus on a sale of the premises to pay her debts remaining after discharging them.

In re Winnegar's Estate, 94 S.W. 833, 118 Mo.App. 445.

Mo.App. 1907. A husband, being an owner of land which he occupied with his wife as a homestead, left her, she remaining on the land. During his absence the land was sold for taxes, and, on his objection to the sale, on his return it was arranged that the purchaser should convey the land to the

wife for life, subject to the wife's debts, remainder to the husband. *Held*, that the husband on the death of the wife was entitled to the balance remaining on a sale of the land after payment of the wife's debts and expenses of administration.

Winnegar v. Coats, 105 S.W. 664, 126 Mo.App. 650.

Mo.App. 1925. Deed of trust of devisee's undivided interest in realty, though given after order of probate court for sale of such realty for payment of decedent's debts, conveys title and binds administrator making distribution of proceeds of sale after payment of debts.

State, to Use of Enyart, v. Doud, 269 S. W. 923, 216 Mo.App. 480.

⇐405. Surplus proceeds of sale on foreclosure paid into probate court.

Mo.App. 1901. Before creditors can be paid out of a surplus arising from a sale of decedent's land under a deed of trust, the administrator is entitled to take out his commission, Rev.St.1899, § 222, V.A.M.S. § 465.070, taxes paid by him, and expenses of administration, including reasonable compensation for necessary legal assistance.

Elstroth v. Young, 88 Mo.App. 418.

⇐406. Proceedings for distribution.

Mo.App. 1906. The probate court has no jurisdiction of a contest between the administrator of a deceased wife, to whom land had been conveyed for life with remainder to the husband subject to her debts, and the husband, as to the ownership of the surplus of the proceeds on a sale of the land to pay the wife's debts remaining after discharging them.

In re Winnegar's Estate, 94 S.W. 833, 118 Mo.App. 445.

Mo.App. 1925. Probate court is without jurisdiction by order of distribution to determine title to portion of proceeds of realty remaining in administrator's hands after payment of decedent's debts as between devisee and beneficiary in deed of trust of devisee's undivided interest, and order of distribution so made does not protect administrator refusing to recognize rights of beneficiary under deed.

State, to Use of Enyart, v. Doud, 269 S. W. 923, 216 Mo.App. 480.

⇐407. Liabilities of purchaser or mortgagee as to application of proceeds.

For cases from other jurisdictions, see other Key Number Digests.

IX. INSOLVENT ESTATES.

⇐408. Administration in general.

Mo.App. 1888. Administrators of an estate which is insolvent represent the general creditors of the estate, and hold its property in trust for them, rather than for one who, in a contest with them, asserts a particular claim which, if sustained, will be at their expense.

Hughes v. Menefee, 29 Mo.App. 192.

Under Rev.St. § 2503, a chattel mortgage, not acknowledged or recorded, is invalid as against the administrators of the mortgagor, where the estate is insolvent.

Hughes v. Menefee, 29 Mo.App. 192.

⇐409-414.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐415. Presentation, proof, and allowance of claims.

Mo. 1882. Under 1 Wag.St. p. 105, § 29, providing that, if there be not sufficient to pay the whole of one class of creditors of the estate of a decedent, the demands shall be paid in proportion to their amounts, and page 109, § 11, requiring the probate court to apportion the money on hand among the creditors according to the provisions of law, and order the administrator to pay the claims according to such apportionment, the probate court, on apportioning the assets of the estate of an insolvent intestate among the creditors, must apportion the assets among the creditors in proportion to the amounts due them, which amounts embrace the interest, as well as the principal, of their demands, and, if there have been any payments made on the demand subsequent to the allowance thereof, such payments must be credited on the demand, though such partial payments arose from the proceeds of collaterals held by the creditors.

In re McCune's Estate, 76 Mo. 200.

Mo. 1930. Statute providing personal tax shall be presented against estates of insolvent debtors in same manner as other indebtedness is not mandatory. Rev.St.1919, § 12932, V.A.M.S. § 140.730.

State ex rel. and to Use of Graves v. Farmers' Trust Co. of Macon, 31 S. W.2d 1069.

⇐416. Payment of claims.

Mo. 1867. Under Rev.Code 1855, p. 151, judgment liens upon the real estate of an insolvent decedent are to be paid out of the proceeds of such real estate in the order of their priority, without reference to the order

of time in which they were exhibited to the probate court for allowance.

Peters v. Holliday, 40 Mo. 544.

⚖417. Rights and remedies of creditors.

Mo. 1939. An alleged creditor of insolvent decedent was without right to maintain suit, in nature of creditor's bill, to set aside alleged fraudulent conveyances by decedent until she had either obtained a judgment on claim in an action against administrator, or obtained allowance of claim against estate upon hearing in probate court.

Buckley v. Maupin, 125 S.W.2d 820, 344 Mo. 193.

The probate court's allowance of claim against a decedent's estate is equivalent of a judgment for purpose of maintaining a creditor's bill.

Buckley v. Maupin, 125 S.W.2d 820, 344 Mo. 193.

Where estate is insolvent, equitable aid may be invoked by creditor to set aside an alleged fraudulent conveyance upon establishment of claim at law against estate, and upon showing that he is a subsisting creditor.

Buckley v. Maupin, 125 S.W.2d 820, 344 Mo. 193.

An allegation by alleged creditor of insolvent decedent that validity of her claim was undisputed by any one was an insufficient allegation of acknowledgment of debt to entitle her to maintain suit, in nature of a creditor's bill, to set aside decedent's alleged fraudulent conveyances without having established claim at law.

Buckley v. Maupin, 125 S.W.2d 820, 344 Mo. 193.

Where alleged creditor of decedent had not established claim against estate at law, and there was no sufficient allegation that validity thereof was acknowledged, allegation that estate was insolvent was not alone sufficient to give equity court jurisdiction of suit, in nature of creditor's bill, to set aside alleged fraudulent conveyances by decedent.

Buckley v. Maupin, 125 S.W.2d 820, 344 Mo. 193.

⚖418. Distribution and settlement.

Mo. 1882. 1 Wag.St. p. 119, § 1, allowing appeals from probate courts on an apportionment among creditors of the estate of a decedent, authorized an administrator to appeal from an order apportioning the estate of his insolvent intestate among his creditors, on the ground that such order injuriously affected certain of the creditors.

In re McCune's Estate, 76 Mo. 200.

Mo. 1883. It is provided in the administration act that, when an administrator is compelled to resort to real estate to pay debts, he shall in his application mention the liens to which it is subject, and also that the proceeds shall be first applied to the payment of the judgment liens according to their priority. 1 Wag.St. p. 95, §§ 11–16; Rev.St.1879, §§ 146, 152–154. *Held*, that, while the statute on the classification of demands evidently contemplated that the liens of judgments were not to be discharged in this manner, unless necessary by reason of the insolvency of the estate, Rev.St.1879, § 184, by this is meant such insolvency as shall render it necessary to make the money by virtue of the lien, and there was sufficient proof of insolvency where, by the sworn statement of the administrator, there was only $300 personalty, and where plaintiff's judgment for $1,910 was for the most part unsatisfied, etc.

Bassett v. Elliott's Adm'r, 78 Mo. 525.

Mo.App. 1893. Heirs of a decedent are entitled to appeal from an order overruling exceptions to the administrator's final settlement, even though the estate is insolvent.

In re Swan's Estate, 54 Mo.App. 17.

⚖419. Review of proceedings.

For cases from other jurisdictions, see other Key Number Digests.

X. ACTIONS.

⚖420. Capacity to sue and be sued in general.

Mo. 1950. Where claim against estate was based on checks issued in payment for exchange, and there was evidence from which inference could be drawn that deceased had received exchange, action was not action on negotiable instruments but was for money had and received, and therefore it was immaterial that claimant had not filled in name of payee on checks as would have been necessary in suit on negotiable instruments, Mo. R.S.A. § 3030, V.A.M.S. § 401.014.

In re De Gheest's Estate, 232 S.W.2d 378, 360 Mo. 1002.

⚖421. Nature and form.

Mo. 1903. The mortgagee, after the decease of the mortgagor, has two remedies—one in the probate court against the whole estate; the other in the circuit court against the mortgaged property.

Cowan v. Mueller, 75 S.W. 606, 176 Mo. 192.

Mo. 1907. Rev.St.1899, § 187, Ann.St. 1906, p. 401, V.A.M.S. § 464.070, providing that actions commenced against executors after the death of the deceased shall be consider-

ed demands legally exhibited against the estate from the time of serving the original process on the executor, has reference to the time when claims shall be considered exhibited, within section 185, Ann.St.1906, p. 399, providing that demands not exhibited in two years shall be barred, etc., and is not authority for the maintenance of a bill in equity to obtain an allowance for a money judgment.

McKee v. Allen, 103 S.W. 76, 204 Mo. 655.

One demanding, in his capacity as administrator, money of his intestate alleged to have been lent to and invested by a decedent, and retained by him until the time of his death, and praying that defendant, as administrator of decedent, be required to pay over the money with interest, has an adequate remedy at law and cannot invoke the aid of equity, especially where the testimony in support of the claim consists of evidence under the control of the claimant.

McKee v. Allen, 103 S.W. 76, 204 Mo. 655.

Mo. 1917. Agreement by joint owners of notes as to survivorship *held* enforceable by action at law by the survivor against the other's administrator, who had collected the notes.

Green v. Whaley, 197 S.W. 355, 271 Mo. 636.

Mo. 1934. Failure of decedent to make provision in will for payment of money due claimant pursuant to contract *held* to leave claimant with adequate remedy at law for breach of contract, precluding suit in equity to establish lien against assets of estate.

State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107.

Mo. 1935. If corporation was organized after death of decedent by administrator for purpose of taking over from estate decedent's business and suit against decedent and company under which name decedent was operating was then pending, suit was in effect a demand against estate. Mo.St.Ann. § 184, p. 115, V.A.M.S. § 464.060.

Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.

Mo.App. 1902. An action against the estate of a decedent to recover for legal services is an action at law.

Kingsbury v. Joseph, 68 S.W. 93, 94 Mo. App. 298.

Mo.App. 1906. Rev.St.1899, § 223, V.A.M.S. § 465.100, authorizes the probate court to allow an executor a reasonable charge for legal advice and services, and 5 per cent, on money arising from the sale of real estate. *Held* that, where a will authorized an executor to sell land and he employed plaintiffs to give him legal advice concerning the management of the estate, and employed them to find a purchaser for the land, and they did so, whereby a sale was consummated, they were entitled to maintain a suit in equity against the administrator de bonis non with the will annexed to recover for such services, it appearing that, under sections 184, 187, 191, 208, V.A.M.S. §§ 464.010, 464.070, 464.080, 464.100, their remedies at law in the probate court would have obtained allowance of their demands as of the fifth class, and the nature of the demands being such that they should be paid in priority to creditors.

Matson v. Pearson, 97 S.W. 983, 121 Mo. App. 120.

Mo.App. 1908. Where the bailee of a special deposit of money dies without returning it, and the money cannot be identified, an action in the nature of conversion is the only remedy available against the executrix on her refusal to recognize the claim.

Stevens v. Stevens, 112 S.W. 35, 132 Mo. App. 624.

Mo.App. 1932. Equity will not assume jurisdiction of claim against decedent's estate until it appears that probate court cannot afford requisite relief.

Curlee Clothing Co. v. Boxer, 51 S.W.2d 894.

Mo.App. 1933. No ground for equitable cognizance of claim against deceased's estate exists, where claimant has adequate legal remedy, either in probate or circuit courts.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Judgment creditor's legal right to enforce lien in probate court by having claim on judgment against deceased properly classified and obtaining sale of realty *held* sufficient to preclude bringing of suit in equity. Rev.St.1929, §§ 146–156, and § 182, subd. 4, V.A.M.S. §§ 463.190–463.240, 463.380–463.420.

Grace v. Lee, 57 S.W.2d 1095, 227 Mo. App. 766.

Mo.App. 1934. Suit against administrator for services rendered daughter of deceased under promise to "pay" plaintiff in will *held* not suit on promise to leave legacy, requiring showing that surplus of estate over debts would be sufficient to pay legacy, but suit as general creditor.

Helsley v. Ferguson, 67 S.W.2d 103, 228 Mo.App. 386.

Mo.App. 1942. In cases involving decedent's promise to make a gift to a claimant on decedent's death for room and board furnished by claimant, claimant may sue in equity for specific performance, sue the administrator at law for breach of contract and recover damages, the measure being the contract price or its value, or abandon the con-

tract and sue the administrator at law on quantum meruit for reasonable value of the services.

Joseph v. Joseph, 164 S.W.2d 145.

Mo.App. 1944. An action at law on a quantum meruit could be maintained against executor for reasonable value of nursing services rendered decedent.

In re Stein's Estate, 177 S.W.2d 678.

Mo.App. 1953. Where plaintiff permitted statute of limitations to run so as to prevent enforcement of legal claim on check payable on death or recovery of deceased given plaintiff by deceased for services rendered, equity could not be called upon to assist in collection of such claim. Sections 464.030, 464.070, RSMo 1949, V.A.M.S.

Alexander v. Wyatt's Estate, 259 S.W.2d 126.

⇐422. Statutory provisions.

For cases from other jurisdictions, see other Key Number Digests.

⇐423. Actions by creditors and others interested in estate.

Mo. 1927. As regards probate court's jurisdiction, only creditors may attack fraudulent transaction of intestate.

State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968, affirming in part and reversing in part 262 S.W. 433.

Mo. 1940. Defendants in possession of farm land, conveyed to them, without consideration, by judgment debtor, and who were receiving the rents and profits therefrom could not complain of the laches of judgment creditors in failing to seek to set aside deeds during life time of judgment debtor.

Blattel v. Stallings, 142 S.W.2d 9, 346 Mo. 450.

Creditors whose claims against estate of deceased debtor were allowed in probate court were not precluded from maintaining actions to set aside as fraudulent conveyances by debtor, during his lifetime, on ground that probate court lacked jurisdiction to allow claims because administrator's waiver of service of notice of claim antedated certificate of allowance where discrepancy in dates was a clerical error, and judgments of the probate court were not questioned by an appeal, or by exception or objections of any interested party. Mo.St.Ann. §§ 186, 187, 193, 196, pp. 115, 117, 127, 130, V.A.M.S. §§ 464.030, 464.040, 464.160, 464.250.

Blattel v. Stallings, 142 S.W.2d 9, 346 Mo. 450.

Creditor obtaining in probate court, allowance of claim based on judgment, against deceased debtor was not precluded from bringing action to set aside conveyance by debtor in his lifetime, as fraudulent, on ground that claim in probate court was based on a matter of record and that no certified copy of record was filed with the claim, where it was not shown that creditor failed to exhibit a copy of the judgment rendered in the lifetime of the deceased to the probate court. Mo.St.Ann. §§ 189, 193, pp. 121, 127, V.A.M.S. §§ 464.080, 464.250.

Blattel v. Stallings, 142 S.W.2d 9, 346 Mo. 450.

Mo. 1942. Where amount alleged to be due on note was not admitted and maker entered appearance in action thereon, plaintiff was required to reduce his claim to judgment before bringing action in equity after maker's death to set aside maker's transfer of property to his children for fraud on creditors, as against contention that case could not be revived in circuit court because maker left no property in state in his name, as it would have been probate court's duty to appoint administrator, so that action might be revived, on proper showing by creditor of maker.

Manufacturers Bank & Trust Co. of St. Louis v. Rossen Furniture Co., 159 S.W.2d 276, 348 Mo. 1177.

Mo.App. 1918. Where a $4,000 interest in real estate owned by intestate at time of death was diverted from the estate by administratrix and heirs, equity will entertain action by creditors to compel heirs and administratrix individually to pay such amount to administratrix in her official capacity; creditors having no adequate remedy in probate court.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

Mo.App. 1936. Owner of certificate issued by corporation which had no right to a license in state and whose incorporators were liable as partners *held* not entitled to maintain creditor's suit against incorporator's administrator on ground that incorporator was a nonresident and insolvent at time of filing of suit because of pendency of several actions against incorporator, where, even if incorporator's estate was liable for all amounts prayed for, record did not disclose that estate was unable to discharge future judgments.

Gilson v. Carroll, 97 S.W.2d 146, 231 Mo. App. 305.

In creditor's suit against administrator of an alleged insolvent nonresident, plaintiff had burden to show insolvency of estate at time suit was brought, and burden was not

upon defendants to show that estate was solvent.

Gilson v. Carroll, 97 S.W.2d 146, 231 Mo. App. 395.

Creditor who failed to show that he did not have an adequate remedy at law against estate could not maintain creditor's suit on showing that intestate became a nonresident several years prior to filing of suit, where it was established that estate was being administered upon in state and plaintiff obtained personal service on administrator, suit in equity not being available when plaintiff has adequate remedy at law.

Gilson v. Carroll, 97 S.W.2d 146, 231 Mo. App. 395.

Creditor who had filed suit against administrator to set aside a conveyance as fraudulent *held* not an "attaching creditor" so as to come within exception to rule that only judgment creditors may maintain creditor's suit in equity, because writ of attachment was issued, whereupon intestate's nonresident wife and daughter entered their appearance, wife and daughter not being debtors. Mo.St.Ann. § 1324, p. 1527, V.A.M.S. § 521.510.

Gilson v. Carroll, 97 S.W.2d 146, 231 Mo. App. 395.

⇐424. Rights of action between coexecutors or coadministrators.

Mo. 1850. An administrator cannot sue his co-administrator at law.

Martin v. Martin, 13 Mo. 36.

Mo.App. 1876. Where funds of an estate are loaned by one executor to the other, the latter giving his note, the first-named executor is entitled to recover on the note.

Cocker v. Cocker, 2 Mo.App. 451.

Where money came into the hands of one of two co-executors of an estate, which he temporarily committed to the other, taking a note therefor, promising to pay the amount to the first executor, with interest, the payee was entitled to maintain a suit against his co-executor on such note, to which it was no defense that the money belonged to the estate of which the defendant was a co-executor.

Cocker v. Cocker, 2 Mo.App. 451.

⇐425. Rights of action by executors or administrators.

⇐426. —— In general.

D.C.Mo. 1945. Where prior to bringing of suit by administrator, the administrator had been discharged and no longer represented the estate of the deceased, he was without capacity to sue.

Banks v. Employers' Liability Assur. Corporation, Limited, of London, England, 4 F.R.D. 179.

Mo. 1834. The executor may sue by petition and summons under Act Jan. 17, 1825, "supplying proceedings at law for the collection of debts," since, though the form of the petition given therein does not suit his case, the statute is intended for general use, and the prescribed form need not be pursued except when it suits the cause.

Bailey v. Ormsby, 3 Mo. 580.

Mo. 1834. Under Rev.Code, p. 106, § 40, making real estate subject to the payment of the debts of a decedent, and the Act Concerning Executors and Administrators, § 38, authorizing the probate court to order the executor, on application of any person interested, to complete the payments on lands which the decedent in his lifetime purchased, and providing that land thus acquired may be disposed of as other real estate of the decedent, an administrator with the will annexed may sue for a breach of covenant made to the testator.

Laberge v. McCausland, 3 Mo. 585.

Mo. 1848. An administrator may maintain an action of trover in every case where the deceased might have done in his lifetime.

Smith v. Grove, 12 Mo. 51.

Mo. 1851. If a foreign administrator fraudulently converts assets transferred to him, and brings them again into the state whence they were removed, an administrator de bonis non appointed in said state cannot recover them in an action of detinue. They can only be reached by bill in equity.

Spraddling v. Pipkin, 15 Mo. 118.

Mo. 1853. If an administrator can maintain an action for the recovery of personal property held under a gift from his intestate on the ground that gift was void as against creditors, a demand must first be made.

Brown's Adm'r v. Finley, 18 Mo. 375.

Mo. 1869. Where the amount due on a note secured by a trust deed on real estate is tendered by the administrator of the original maker, and is refused, he may immediately afterwards file his petition to redeem the land; and, if it be sold under the deed after tender, he may still obtain an order to set aside the sale and redeem the property; and, if he needs the money to pay the debts of the estate, he is a proper plaintiff in a bill for cancellation of the sale under the trust deed.

McGlothlin v. Hemery, 44 Mo. 350.

Mo. 1882. A public administrator, not legally in charge of the estate of a decedent, cannot maintain an action for the recovery of property belonging to such estate.

Lewis v. McCabe, 76 Mo. 307.

Mo. 1884. A promise by a surviving partner to pay to the administrator of the individual estate of a deceased partner the sum found to be due the deceased partner after a settlement of the partnership transactions is enforceable by the administrator in his official capacity.

Holman v. Nance, 84 Mo. 674.

Mo. 1926. Executrix of estate was only party entitled to sue for conversion of assets by attorney.

Repetto v. Walton, 281 S.W. 411, 313 Mo. 182.

Mo. 1942. Where proceeds of certain stock which was an asset of estate of decedent was not a trust fund for payment of specific legacy to beneficiary, since deceased, or to her administrator, but was for benefit of all creditors and other claimants against decedent's estate, the right to recover for appropriation of such stock rested in legal representatives of decedent's estate, and could not be brought by beneficiary's administrator.

Niederberg v. Golluber, 162 S.W.2d 592.

Mo. 1943. Where intestate's real and personal interests are intermingled, in the same suit, the administrator may bring, defend, or join in the action.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1887. As the right to the possession of personal property of a decedent belongs solely to the representative of the decedent, and not to his heirs, the representative, and not the heirs, is entitled to recover for a conversion of personalty belonging to the decedent.

Barnes v. Prewitt, 28 Mo.App. 163.

Mo.App. 1897. A covenant by a lessee to pay taxes on real estate is a covenant running with the land, the substantial breach occurring when the taxes becoming due and payable are not paid by the covenantor, but by the covenantee; and therefore the heirs, and not the executor, are the parties to maintain an action for breach of such covenant, especially where the payment of the tax has been made by the heirs.

Hendrix v. Dickson, 69 Mo.App. 197.

Mo.App. 1897. An administrator cannot maintain a suit to have a judgment of a third party against his decedent enforced against land which had once belonged to his decedent.

Moore v. Bruce, 71 Mo.App. 663.

Mo.App. 1916. Administrator pendente lite *held* authorized to bring unlawfully entry and detainer against occupants of decedent's realty.

Diehr v. Dean, 187 S.W. 602.

Mo.App. 1950. Administrator was entitled to bring action on fire policies providing that loss could be recovered by insured, or, if she were deceased, then by her "legal representatives," and action was not required to be brought by heirs of insured.

Dyer v. Standard Fire Ins. Co. of N. J., 227 S.W.2d 520.

Mo.App. 1950. An administrator cannot attack a transaction of his decedent on ground of decedent's own fraud any more than decedent could, in his lifetime, assert his own fraud to avoid his own contract.

Runnion v. Paquet, 233 S.W.2d 803.

An administratrix of an estate could not maintain an action to enjoin the beneficiary under decedent's life policies from collecting thereon on ground that beneficiary secured execution of policies on fraud, since administratrix merely represented the estate as against the creditors and did not represent the creditors as against the estate.

Runnion v. Paquet, 233 S.W.2d 803.

⇐427. —— Personal or representative capacity.

D.C.Mo. 1933. Statute *held* to confer no authority on administrator to prosecute assigned causes of action. Rev.St.Mo.1929, § 94, Mo.St.Ann. § 57, V.A.M.S. §§ 462.010, 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

Right of action, if any, which beneficiary in life policies had against insurer for cancellation while insured was insane, could not be assigned to beneficiary as administratrix of insured's estate, and prosecuted by her in her representative capacity. Rev.St.Mo. 1929, § 94, Mo.St.Ann. § 57, V.A.M.S. §§ 462.010, 462.140.

Kevan v. John Hancock Mut. Life Ins. Co., 3 F.Supp. 288.

Mo. 1825. Where a note made payable to an executor is delivered to him as such executor, he may sue thereon in his representative capacity.

Rector's Ex'rs v. Langham, 1 Mo. 568.

An executor or administrator may sue in his individual capacity on a note payable to him as administrator.

Mo. 1845. Thomas v. Relfe, 9 Mo. 377.

Mo. 1874. Smith v. Monks, 55 Mo. 106.
Mo. 1876. Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am.Rep. 215.

Mo. 1855. A judgment for money recovered by an administrator in his representative capacity in the state of his appointment will be considered in this state to vest in him personally prima facie title to the money, so as to authorize an action on the judgment here in his own name.
Hall v. Harrison, 21 Mo. 227, 64 Am.Dec. 225.

Mo. 1872. Where an administrator holding a note payable to his intestate accounts therefor in full in his settlement with the estate, as inventoried to himself, no one complaining thereof, such note becomes his property as against the maker, who, in a suit thereon, cannot defend that it belongs to the estate.
Lyons v. Doherty's Estate, 50 Mo. 38.

Mo. 1872. Where a note was made to an executrix in her representative capacity, her administrator, in the event of her death, may sue on the note in his own name.
Block v. Dorman, 51 Mo. 31.

Mo. 1883. An administrator may sue in his representative capacity on a promise to pay to the "estate," made after the death of his intestate.
Mosman v. Bender, 80 Mo. 579.

Mo.App. 1935. Purchaser's action to recover part of purchase price for land sold by executor *held* not maintainable against executor in its individual capacity where sales contract in designation of parties and in signatures clearly showed that purchaser was not dealing with executor in its individual capacity.
Cory v. Conqueror Trust Co., 86 S.W.2d 611.

⇐428. Rights of action against executors or administrators.

⇐429. —— In general.

C.C.Mo. 1886. Where an administrator, by collusion and connivance, aids in having claims against the estate placed in a higher class than that in which they belong, and in that way prevents anything being left for other claims of the same sort properly classed, he is liable to holders of the latter claims for their share of the amount diverted, and may be sued therefor; and it is unnecessary for the claimants wronged to await the final settlement of the estate before suing, even where by so doing they could obtain a remedy in the probate court by a restatement of the account.
Dodd v. Ghiselin, 27 F. 405.

C.C.Mo. 1901. It is a fundamental rule that the real estate of an intestate descends directly to the heirs at law, and that both the title and right of possession to the personal property vest exclusively in the administrator. Until an order of distribution has been made by the probate court having jurisdiction of the estate, an heir has no interest in the personal estate which will support an action, and, even after such an order has been made declaring the respective interests of the distributees, an heir has no title to any specific property, and cannot maintain an action for its conversion against the administrator, but his remedy is by action on the administrator's bond.
Scruggs v. Scruggs, 105 F. 28.

Mo. 1846. Where, on final settlement, an administrator is ordered to distribute the money in his hands, no demand by the distributees on him is necessary to support an action for their distributive shares.
Henry v. State, to Use of Russell, 9 Mo. 778.

Mo. 1852. To justify a proceeding against an administrator for waste, under article 7, §§ 1–3, of the act concerning administration, it must appear that there is an insufficiency of assets, returned by the administrator, to pay plaintiff's and all other debts.
Powers v. Blakey's Adm'rs, 16 Mo. 437.

Mo. 1852. An officer in the Revolutionary army made a deed of gift in 1834 of three-fourths of his claim for land to which he was entitled for services as such officer, and all money due therefor by virtue of any laws of Virginia or the Congress of the United States. His administrator received moneys from the United States on account of the intestate's half pay. *Held*, that the administrator was not liable therefor to the grantees in the deed of gift until after demand.
Evans v. King, 16 Mo. 525.

Mo. 1948. If shown that there was a mutual understanding that claimant, who was a niece by marriage of decedent, and who made her home with decedent and his wife, was to be remunerated for services performed by her for decedent and wife by decedent and wife leaving "her all their combined estate", and that claimant performed agreement on her part, claimant was not obliged to only pursue a remedy in equity specifically performing alleged agreement, but she could waive the agreement and, based upon proof of her performance of services and a demonstration of the mutual understanding rebutting presumption that services were gratuitous, she could at law recover reasonable value of services rendered, but

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in such case recovery should not exceed in amount value of the property promised.

Kopp v. Traders Gate City Nat. Bank, 210 S.W.2d 49, 357 Mo. 659.

Mo. 1952. Where deceased failed to keep his promise to compensate for services by leaving his property to person who rendered such services, such person could bring suit in equity for specific performance, suit for breach of contract, under certain circumstances, or abandon the contract and sue in quantum meruit for reasonable value of such services.

Muench v. South Side Nat. Bank, 251 S.W.2d 1.

Mo.App. 1938. An heir is not entitled to any part of an estate until there has been a proper ascertainment that a surplus exists after payment of debts and costs of administration, and hence cannot sue for his share until after order of final distribution is made.

Cook v. McCoy, 118 S.W.2d 1043.

Mo.App. 1940. Where default judgment was rendered against defendant in action on note, and the judgment was classified as a fourth-class claim against defendant's estate, plaintiff could not enforce demand against estate by incorporating it in suit based on note, which suit was abated by the death of defendant. Mo.St.Ann. § 187, p. 117, V.A.M.S. § 464.040.

Bank of Skidmore v. Bartram, 142 S.W. 2d 657.

Mo.App. 1941. A demand against the estate of a deceased person may be established or allowed only under provisions of statute covering administrations and relating to allowances and classifications of demands against estates or in an action in the circuit court. Rev.St.1939, § 181 et seq., Mo. St.Ann. § 182 et seq., p. 108 et seq., V.A.M.S. § 464.010 et seq.

In re Main's Estate, 152 S.W.2d 696, 236 Mo.App. 88, transferred 146 S.W. 2d 597.

Mo.App. 1952. Where plaintiff allegedly paid funeral expenses of her deceased husband and cost of tombstone in reliance on representations by her daughter and undertaker that she was liable therefor but instead of filing demands for payment in her own right she sought to have parties to whom payments had been made file demands, plaintiff had an adequate remedy at law but failed to exercise her rights as provided by law and could not obtain equitable relief. V.A.M.S. § 464.230.

Rhodes v. Rhodes' Estate, 246 S.W.2d 98.

Where plaintiff allegedly paid funeral expenses of her deceased husband and cost of tombstone in reliance on representations by her daughter and undertaker that plaintiff was liable therefor, it was no ground for legal fraud that daughter exercised her legal right, as heir to estate, by filing affidavit with probate court stating that demands filed by plaintiff for amount of payments made had been improperly allowed. V.A.M.S. § 464.310.

Rhodes v. Rhodes' Estate, 246 S.W.2d 98.

Administratrix could only administer estate by order of probate court and representations made by plaintiff's daughter, one of heirs, as to her opinion regarding law or regarding liability of plaintiff to pay for funeral expenses and for tombstone of her deceased husband, in no way could bind estate and neither could offhand opinion of undertaker bind estate or constitute such legal fraud as to be grounds for equitable action by plaintiff to recover amounts paid by her from the estate of deceased husband. V.A.M.S. §§ 464.010 to 464.030, 464.080, 464.090.

Rhodes v. Rhodes' Estate, 246 S.W.2d 98.

⇐430. —— Personal or representative capacity.

Mo.App. 1882. An administrator, who receives from a creditor of the estate a greater sum than is due, and applies the whole sum as assets of the estate, is personally responsible for the excess above what is actually due.

Davis v. Krum, 12 Mo.App. 279.

Mo.App. 1910. An executor or administrator is personally responsible for property he detains from a claimant as assets of the estate of the deceased, with knowledge that it did not belong to decedent, but to claimant.

White v. McFarland, 128 S.W. 23, 148 Mo.App. 338.

Where an executor or administrator inventoried in good faith as assets of the estate of decedent personal property in possession by decedent at the time of his death, and then refused to turn the same over to a claimant, believing in good faith that the property was an asset of decedent's estate, replevin would lie against him in his representative capacity, and not against him in his individual capacity, since, under Rev.St.1899, § 4476, Ann.St.1906, p. 2454, V.A.M.S. § 533.140, judgment in replevin must be either for the return of the property or for its value at the election of plaintiff.

White v. McFarland, 128 S.W. 23, 148 Mo.App. 338.

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Mo.App. 1913. Where property, not belonging to the estate, is taken possession of and held in good faith by the administrator as property of the estate, replevin lies by the owner against the administrator in his official capacity.

Silsby v. Wickersham, 155 S.W. 1094, 171 Mo.App. 128.

Where an administrator sold as part of the estate property not belonging to the estate and used the proceeds as part of the estate, equity will decree payment to the owner out of the funds of the estate.

Silsby v. Wickersham, 155 S.W. 1094, 171 Mo.App. 128.

Where a wholesale dealer sold goods to an administrator and parted with the possession and ownership, he could not replevy the goods nor obtain relief in equity, on the theory that the proceeds had been used for the benefit of the estate.

Silsby v. Wickersham, 155 S.W. 1094, 171 Mo.App. 128.

Mo.App. 1931. Where executor in good faith takes possession of property not belonging to estate, owner may sue executor in official capacity in replevin or conversion.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

Where executor took possession of relator's bonds found in deceased's safe deposit box as being property of estate, relator could sue executor as such.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

Mo.App. 1932. Person who has claim allowed against estate cannot hold administrator as an individual.

St. Louis Law Printing Co. v. Aufderheide, 45 S.W.2d 543, 226 Mo.App. 680.

Mo.App. 1935. Purchaser's action to recover part of purchase price for land sold by executor *held* not maintainable against executor in its individual capacity where sales contract in designation of parties and in signatures clearly showed that purchaser was not dealing with executor in its individual capacity.

Cory v. Conqueror Trust Co., 86 S.W.2d 611.

⇐431. Conditions precedent.

⇐431 (1). In general.

Mo.App. 1932. Action to require probate court to order administratrix to pay taxes on intestate's realty sold to plaintiff could be maintained, although plaintiff had not paid taxes, since action was not for recovery of any amount.

Riley v. Akin, 45 S.W.2d 122, 226 Mo. App. 735.

⇐431(2). Presentation of claim to executor or administrator in general.

Mo. 1934. That decedent conveyed land without sufficient or valuable consideration does not warrant setting aside deed at instance of alleged claimant against decedent's estate, without claimant's first establishing claim as creditor of estate and alleging and proving that estate was insolvent.

State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107.

Mo.App. 1904. Legal services rendered an executor are expenses of administration, and cannot be recovered in an action against the executor until allowed as a claim against the estate.

Stephens v. Cassity, 77 S.W. 1089, 104 Mo.App. 210.

Mo.App. 1908. Defendant's testator executed two notes to plaintiff, with a contract annexed which recited the issuance of certain stock to him (plaintiff), and provided that plaintiff would accept a certain sum, if tendered to him by testator within six months, and assign the stock to testator, or return the notes to him to be canceled, but providing that plaintiff should not demand payment of the notes when due unless he transferred the stock to testator or his representative. Testator had the stock in his possession at his death for the purpose of selling it. *Held*, in an action against his administratrix on the notes, that she could not object that plaintiff did not present his claim and offer to transfer the stock to the estate in accordance with the contract; she being in possession of it, and refusing to produce it at trial for formal transfer to herself.

Dickson v. Eames, 114 S.W. 574, 134 Mo.App. 373.

Mo.App. 1913. Failure to serve notice upon an administrator of presentation of the claim is waived where the administrator goes to trial by agreement.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

Mo.App. 1914. The attorney of an administrator can institute an independent suit in the circuit court for his fee without seeking an allowance by the probate judge.

In re Lutz's Estate, 162 S.W. 679, 175 Mo.App. 427.

Mo.App. 1930. Claimant's failure to personally serve notice of claim on executrix, or file instruments on which his debt was predicated, precluded jurisdiction of court in action predicated on claim. Rev. St.1919, §§ 185, 186, 195, 196, V.A.M.S. §§ 464.030, 464.070, 464.150, 464.160.

Curtis v. La Force, 29 S.W.2d 191.

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Mo.App. 1934. Suit in equity to establish trust against fund amongst assets of estate of executor of estate of original testatrix, who devised her property to executor with legacy over on his death, *held* not barred because legatees did not present claim against estate of executor within a year after issuance of letters testamentary thereunder, since legacy was not asset of such estate and no claim therefor need have been made against estate within such limitation period.

Bond v. Unsell, 72 S.W.2d 871.

Mo.App. 1934. Where subject-matter of claim was not within jurisdiction of probate court, failure to present claim within one year as provided by special probate statute of limitation *held* not to bar recovery on claim in separate suit against decedent's executor. Mo.St.Ann. § 75, p. 45, V.A.M.S. § 461.440.

Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.

Mo.App. 1939. Suit by husband's administratrix against wife's administratrix in her individual capacity for conversion of diamonds belonging to husband's estate could not be defeated on ground that it was premature and that application should have been made for relief in probate court, where probate court had previously adjudicated that diamonds belonged to husband and did not constitute part of wife's estate. Mo.St. Ann. § 230, p. 149, V.A.M.S. § 465.160.

Manley v. Ryan, 126 S.W.2d 909, 235 Mo.App. 45.

⇐431 (3). Foreclosure of mortgage or other lien.

Mo.App. 1910. Where the seller of land scrip gave a note, secured by a deed of trust on lands, to the buyer to secure him in case the scrip proved invalid, as it afterward did, and the buyer pledged some of the scrip to a bank to secure his own note, the bank, without presenting the note as a claim against the maker's estate, and after the running of the two-year statute of limitations, could sue to recover its share of the proceeds of the foreclosure of the deed of trust by the executor.

Holland Banking Co. v. See, 130 S.W. 354, 146 Mo.App. 269.

⇐432. Defenses against executors or administrators.

U.S.Mo. 1878. It is not a collateral attack on the authority of a public administrator to set up as defense to his action on a life insurance policy that the deceased was a resident of another state, and left no assets in the state where the administration was had, since such facts show that he was without authority at all.

Union Mut. Life Ins. Co. v. Lewis, 97 U.S. 682, 24 L.Ed. 1114.

There is nothing in the above decision in conflict with the doctrine that the authority of a public administrator is not to be questioned in a collateral proceeding.

Union Mut. Life Ins. Co. v. Lewis, 97 U.S. 682, 24 L.Ed. 1114.

Mo. 1855. In a suit by an administrator on a note of his intestate, it is no defense that the county court had allowed a former administrator, on settlement, credit for the amount of the note.

Henderson's Adm'r v. Henderson, 21 Mo. 379.

Mo. 1857. Though an administrator may be released by the probate court from liability for an inventory debt because it had been improperly inventoried, such fact cannot be set up as a bar to an action by the administrator for the debt.

Shore's Adm'x v. Coons, 24 Mo. 553.

Mo.App. 1891. In a suit by an executor to foreclose a vendor's lien against the residuary legatee, a defense that there are no debts against the estate, and that the executor has in his hands enough money to pay all legacies, except the residuary legacy belonging to defendant, is not available to defendant, unless he first tenders the bond required by Rev.St.1889, § 238, V.A.M.S. § 465.-300, providing that executors shall not be required to pay legacies within two years, unless refunding bond be given.

Powell v. Palmer, 45 Mo.App. 236.

⇐433. Defenses by executors or administrators.

Mo. 1873. Where a note was given by an administrator in payment of claims against his estate, in order to release his own property from executions illegally levied for the amount of such claims, while under a mistaken impression, from his reports and settlements, of the amount of the trust assets in his hands, he is not precluded, in an action on the note, from showing that it was given under such mistaken impression, and that in fact there were no assets subject to payment of such claims.

Smith v. Paris, 53 Mo. 274.

Mo. 1940. Wife was not barred by "estoppel" or "laches" in action against her deceased husband's administrator to establish her interest in secured notes, on ground that they were purchased with the proceeds from an estate by the entirety, where the rights of no innocent third person were involved,

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and husband's assumption of dominion over property held by the entirety and wife's inaction resulted to husband's advantage, and not to his injury or detriment.

Schwind v. O'Halloran, 142 S.W.2d 55, 346 Mo. 486.

Mo. 1950. Where claim against estate was based on checks issued in payment for exchange, and there was evidence from which inference could be drawn that deceased had received exchange, action was not action on negotiable instruments but was for money had and received, and therefore it was immaterial that claimant had not filled in name of payee on checks as would have been necessary in suit on negotiable instruments. Mo.R.S.A. § 3030, V.A.M.S. § 401.014.

In re De Gheest's Estate, 232 S.W.2d 378, 360 Mo. 1002.

Mo.App. 1879. That there are general assets of the estate destroys the force of an objection that the action, being for rent of land lying in another state, which has become due since the death of the lessee, does not lie against an executor appointed by a court of this state.

Traylor v. Cabanne, 8 Mo.App. 131.

The rule that where an executor is sued as in possession, or at least as assignee of the term, he may plead he is the executor without assets, and then plead that the premises are of less value than the rent, does not apply where the executor is not sued as in possession, or recovery sought de bonis propriis, or where the executor, as in the case at bar, is sued as such and has assets.

Traylor v. Cabanne, 8 Mo.App. 131.

Mo.App. 1886. It is no defense to an action, under Rev.St. § 191, to establish a demand against a decedent's estate, that the estate has been entirely settled; that fact only affecting the form of the judgment.

Taylor v. Priest, 21 Mo.App. 685.

Mo.App. 1889. The distributee of an intestate's estate, by standing by and seeing the administrator sell the property as unincumbered property of the estate, is estopped from suing the administrator as for a conversion, and from asserting a specific lien on the property and the proceeds, which she has waived by her conduct, and which she cannot re-establish upon the discovery of other claims against the estate.

Meeker v. Straat, 38 Mo.App. 239.

⇐434. Set-off and counterclaim.

⇐434(1). In actions by executors and administrators.

Mo. 1882. One sued by an administratrix for a debt due the estate cannot claim credit for provisions furnished to the plaintiff in her personal capacity, though a receipt was given to the effect that the provisions were to be applied on the debt.

State ex rel. Christy v. Donegan, 12 Mo. App. 190, affirmed 83 Mo. 374.

Mo. 1887. An administratrix, having an interest in the estate, receipted officially to a partner of deceased for an individual debt, less than the administratrix's interest in the estate, to be deducted from any judgment thereafter obtained against said partner by the estate. *Held*, that such credit, with interest, should be allowed as an equitable set-off, the administratrix admitting the estate to be solvent.

State ex rel. Christy v. Donegan, 6 S.W. 693, 94 Mo. 66.

Mo. 1900. Where a nonresident holds notes for collection as a decedent's agent, and after his death collects them, in an action by him against decedent's administrator to recover a balance due him from the estate on a note the court may adjust the differences, and render judgment against such claimant in favor of the decedent's estate.

Bealey v. Smith, 59 S.W. 984, 158 Mo. 515, 81 Am.St.Rep. 317.

Mo.App. 1928. Counterclaim, based on decedent's oral promise to make will, *held* proper defense to administrator's action on note. Rev.St.1919, §§ 1232, 1233, V.A.M.S. § 509.080 et seq.

Thompson v. Bratcher, 8 S.W.2d 1027.

Where counterclaim, if allowed, would be less than note sued for, administrator could recover principal, interest, and reasonable attorney's fee, less damages allowed on counterclaim.

Thompson v. Bratcher, 8 S.W.2d 1027.

Mo.App. 1938. In replevin action for an automobile by the executor of deceased owner, defendant's counterclaim based on the rendition of services to the deceased was properly stricken is not being within statute permitting counterclaims "arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action." Mo.St.Ann. § 777, p. 1022, V.A.M.S. §§ 509.420, 509.430.

Hoshaw v. Fenton, 110 S.W.2d 1140, 232 Mo.App. 137.

⇐434(2). —— As between debts arising before, and those accruing after, death of decedent.

In an action by an executor or administrator on a cause of action accruing to him as such after the death of the testator or

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intestate, a debt due from such intestate or testator cannot be set off.

Mo. 1843. Woodward v. McGaugh, 8 Mo. 161.

Mo. 1855. Lee's Adm'x v. Lee, 21 Mo. 531, 64 Am.Dec. 247.

Mo. 1874. 2 Wag.St. p. 1274, § 8, permitting a debt of the intestate, belonging to the defendant at the time of the decease, to be set off in a suit by the administrator, does not include notes of the intestate upon which the defendant was surety, which had been paid by defendant after the probate.

White v. Henly, 54 Mo. 592.

⇐434 (3). — Legacy or distributive share.

Mo. 1835. In an action by administrators on a joint note, given to them as such, against distributees of the estate, the defendants may set off their distributive shares which the plaintiffs have been ordered by court to pay over.

Whaley v. Cape, 4 Mo. 233.

Mo. 1921. Where a son gave a promissory note without interest to his father to evidence a debt, and was by the father's will given a distributive share, the son could not resist payment of interest in action by administrator pendente lite on the note on the supposed equity of offsetting the distributive share greater than face of note against the note, so that no interest should be collected until settlement of the estate; and the fact that a will contest was instituted would not suspend interest, as such contest did not prevent payment of the note.

Watts v. Mayes, 232 S.W. 122.

⇐434(4)-434(5).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐434 (6). — Time of interposing.

Mo. 1874. The statute barring claims against an estate not exhibited within two years only applies to claims brought in the first instance against the estate, and does not apply to a counterclaim of a demand against an estate set up in a suit by the administrator against the creditor.

Stiles v. Smith, 55 Mo. 363.

The general statute of limitations, and not the special one touching administrators, applies to a counterclaim set up by a creditor in the suit of the administrator; Wag. St. p. 1274, § 3, permitting such demand to be set off "in the same manner as if the action had been brought by the deceased."

Stiles v. Smith, 55 Mo. 363.

Mo. 1875. A bank, sued by the administrator of a deceased stockholder and depositor to recover the dividends accruing on the stock since the date of the death of the stockholder, and to recover the amount of the deposit, is not barred by the three-year statute of limitations from setting up the defense that the testator owed the bank.

Lay v. Mechanics' Bank, 61 Mo. 72.

⇐434 (7). In actions against executors and administrators.

Mo. 1852. In an action by a child against his mother's administrator for money received by her as his guardian, the administrator cannot set up a claim for the support and education of her child by the intestate unless it appears that she intended to charge him therefor.

Guion v. Guion's Adm'r, 16 Mo. 48, 57 Am.Dec. 223.

Mo. 1939. In action by donee beneficiary on an oral agreement with beneficiary's mother to pay beneficiary a designated sum when he became of age and to protect him by provision therefor in promisor's will, promisor during his lifetime and his representatives subsequent to his death could assert against beneficiary any defenses available against the original promisee.

Nute v. Fry, 125 S.W.2d 841, 344 Mo. 163, 121 A.L.R. 673.

⇐435. Jurisdiction.

Mo. 1845. The eighth section of the first article of the act establishing courts of record and prescribing their powers and duties, Rev.Code, p. 155, confers on a court of chancery the power to enforce the payment of legacies.

Berry v. Robinson, 9 Mo. 276.

Mo. 1850. Where property alleged to belong to a decedent's estate is in possession of divers persons, including an unremoved coadministrator of the estate, who refused to turn it in for administration, the equity jurisdiction of the circuit court of a suit by another coadministrator to recover property on behalf of the estate is not ousted by the administration act, conferring jurisdiction on the county courts over the estates of deceased persons.

Martin v. Martin, 13 Mo. 36.

Mo. 1869. The probate court has no power to set aside a conveyance of a decedent on the ground of fraud.

Merry v. Fremon, 44 Mo. 518.

Mo. 1870. County courts exercising probate jurisdiction of wills have only such jurisdiction as is conferred by the statute, 1 Wag.St. p. 440, § 7, and therefore cannot take

cognizance of an action to compel an executor to execute a deed to land which he was authorized to sell for a specified object, not connected with the administration, but in pursuance of a provision to that effect in the will.

Coil v. Pitman's Adm'r, 46 Mo. 51.

A probate court has no power to compel specific performance by an administrator of a contract for the sale of his testator's real estate, when the authority to sell is not derived from statutory provisions, but from an express power in the will.

Coil v. Pitman's Adm'r, 46 Mo. 51.

Mo. 1873. Under 1 Rev.Code 1855, § 15, p. 535, providing that a county court shall have jurisdiction over all suits against executors and administrators on any demand against the estate of their testator or intestate, the county court has jurisdiction to hear an action of trespass for acts committed by the deceased.

Mayberry v. McClurg, 51 Mo. 256.

Mo. 1874. A defendant, in an action brought in the court of common pleas by an administrator for a debt due the estate, may counterclaim a debt owing him by the estate, notwithstanding Acts 1865–66, p. 83, § 6, giving the probate court exclusive jurisdiction of suits and proceedings instituted against administrators on demands against the estate, since such acts only contemplate a voluntary procedure against an estate, and do not deny the right to make any defense on being involuntarily brought into another court.

Stiles v. Smith, 55 Mo. 363.

Mo. 1877. Since, by Acts 1849, p. 436, § 4, jurisdiction was conferred on the probate court of Madison county "to hear and determine all suits and other proceedings instituted against executors or administrators, upon any demand against the estate," the circuit court has no authority to try causes against executors or administrators appointed by such probate court upon demands against the estate.

Wernecke v. Kenyon's Adm'r, 66 Mo. 275.

Mo. 1878. Under Acts 1865–66, p. 84, § 6, giving the probate court of Barton county exclusive original jurisdiction of actions against executors and administrators, with right of appeal to the circuit court, the probate court alone had jurisdiction of a suit against an administrator and another defendant, a joint obligor of the deceased.

Julian v. Ward, 69 Mo. 153.

Mo. 1879. The jurisdiction of the probate and common pleas court of Green county is substantially the same as that conferred by the statute upon county courts, having probate jurisdiction "to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate when such demand shall not exceed" a certain amount, and concurrent jurisdiction with the circuit court in all such cases when the demand shall exceed that sum. *Held* that, as the suit to enforce a vendor's lien is not a proceeding which can be maintained against the administrator alone, such court has no jurisdiction.

Ross v. Julian, 70 Mo. 209.

Mo. 1881. Under Acts 1866, p. 84, §§ 1, 6, and Acts 1870, pp. 224, 225, §§ 1, 2, the probate court of Holt county, and not the circuit court, had jurisdiction of a suit by the administrator of the estate of a deceased partner against the public administrator, in charge of the partnership estate, for the purpose of having an account taken and a receiver appointed to take charge of the partnership property during the pendency of the suit, and for the procuring of an order for the sale of the partnership property and the application of the proceeds, first to the payment of debts of the partnership, and thereafter the distribution of the remainder to the administrator of the estate of the deceased partner.

Caldwell v. Hawkins, 73 Mo. 450.

Mo. 1882. Laws 1865–66, p. 84, § 6, providing that the probate court of a county shall have exclusive original jurisdiction to determine all suits instituted against executors and administrators on a demand against the estate of the decedent, devests the circuit court of all jurisdiction to render judgment on any demand against the estate of a deceased person in a suit commenced after the death of a deceased person against his administrator.

Wernse v. McPike, 76 Mo. 249.

Mo. 1884. Laws 1849, p. 432, § 6, provides that the probate court of Moniteau county shall have exclusive original jurisdiction to hear and determine all suits instituted against executors and administrators on any demand against the estate of the decedent. Wag.St.1872, p. 440, § 7, provides that the several county courts shall, when not otherwise provided by law, have exclusive original jurisdiction to hear and determine suits and other proceedings instituted against executors and administrators on any demand against the estate or of the decedent. A wife sold her real estate, and delivered the proceeds thereof to the husband, under an arrangement that he should hold the same for the benefit of the wife's children by a former husband. The husband died without accounting for the proceeds. *Held*, that the

For references to other topics, see Descriptive-Word Index

children of the wife were entitled to maintain proceedings against the representative of the deceased husband in the probate court of Moniteau county.

Hammons v. Renfrow, 84 Mo. 332.

Mo. 1889. Under the provisions of Rev. St.1879, §§ 5378, 5380–5385, relating to settlements by the county treasurer with the county courts, and the power of said court to enforce such settlements, the county court has exclusive jurisdiction of a proceeding by the county against the executrix of a deceased treasurer to enforce a claim due to the county, the proceedings not being on the bond; and the probate court has no jurisdiction of such case.

Cole County v. Schmidt, 10 S.W. 888.

Mo. 1890. Rev.St.1879, § 192, giving probate courts jurisdiction of suits against executors and administrators on demands against deceased persons, gives them jurisdiction of claims by a county against the personal representative of a deceased county treasurer.

Cole County v. Dallmeyer, 13 S.W. 687, 101 Mo. 57.

Mo. 1890. The circuit court of St. Louis county had jurisdiction to issue and to have served its process on an administrator, appointed by the court of another county, he being found in St. Louis county, as well as on a codefendant who resided in the latter county, and to render judgment against both of them on a demand of which it had jurisdiction.

Wernse v. McPike, 13 S.W. 809, 100 Mo. 476.

Mo. 1894. Under Rev.St.1889, § 3397, V.A.M.S. § 481.020, giving the probate court jurisdiction over all matters pertaining to probate business, the probate court may entertain an action by a widow to compel the executors to account for the rents of her husband's mansion house plantation accruing before the assignment of her dower.

Gentry v. Gentry, 26 S.W. 1090, 122 Mo. 202.

Mo. 1914. Under V.A.M.S. Const. art. 6, §§ 22, 23, 34, and Rev.St.1909, §§ 191–194, 214, 4056, V.A.M.S. §§ 464.020, 464.060, 464.070, 464.100, 481.020, the circuit court has jurisdiction of an action to establish a claim against a decedent's estate.

Linn County Bank v. Clifton, 172 S.W. 388, 263 Mo. 200.

Mo. 1936. Phrase "court of record" in statute providing that demands against estate can be established by judgment or decree of some court of record *held* to refer only to courts of record in Missouri, which would include federal courts in Missouri if presented case involved federal jurisdiction. Mo.St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Mo. 1944. Where grantor sought to redeem land from grantee's executrix on ground that deed was a mortgage, and executrix individually and in her representative capacity entered into litigation and agreed to subject herself and the land to test of grantor's cause and abide by court's decree, court could determine the whole controversy.

Brewster v. Terry, 180 S.W.2d 600, 352 Mo. 967, transferred 172 S.W.2d 5.

Mo. 1947. Doctor's claim against estate for services rendered administratrices as a psychiatric expert before will was found, was properly established in circuit court under statutes authorizing the establishment in the circuit court, of claims provable as demands in probate court. Mo.R.S.A. §§ 183, 184, 188, V.A.M.S. §§ 464.020, 464.050, 464.060.

Barnes v. Boatmen's Nat. Bank of St. Louis, 199 S.W.2d 917, 355 Mo. 1136.

Mo.App. 1881. Inasmuch as, under Rev. St. § 1176, it is the intention of the administration law that the ordinary jurisdiction of settling the accounts of administrators shall be committed to the probate court, and no order of sale of real estate can be made for the costs of administration, a judgment against an administrator in the circuit court for services rendered the estate by an attorney should not be allowed against the estate of the deceased.

Garnett v. Carson, 11 Mo.App. 290.

Mo.App. 1882. A probate court has no jurisdiction to entertain a suit against one for the collection of a debt due to a decedent's estate, from the fact that the person proceeded against has been an executor of the estate to which it is claimed that he is indebted.

McManus v. McDowell, 11 Mo.App. 436.

Mo.App. 1886. Where a judgment debtor died after the judgment was obtained, but prior to his death had conveyed certain lands, the judgment creditor had a remedy in equity to enforce a lien on the lands, since no execution could issue, and the lien could not be enforced in probate court.

Griswold v. Johnson, 22 Mo.App. 466.

Mo.App. 1893. Under Rev.St. § 190, V.A.M.S. § 464.080, providing that any person having a demand against an estate may establish the same by judgment or decree of some court of record, an attorney who has rendered services for an administrator, and

for which the estate is liable, may, after the death of the administrator, maintain an action in the circuit court to recover for such services.

Nichols v. Reyburn, 55 Mo.App. 1.

Mo.App. 1902. A probate court has no jurisdiction to entertain a suit by the maker of a note against the administrator of the holder to compel the administrator to credit on the note payments thereon made to the deceased.

Reed v. Reed, 68 S.W. 385, 94 Mo.App. 590.

Mo.App. 1904. Rev.St.1899, § 191, V.A.M.S. § 464.080, providing that any person having a demand against an estate may establish the same by the judgment or decree of some court of record in the ordinary course of proceeding, is intended to give circuit courts jurisdiction to establish demands against the estate of deceased persons, and can in no sense be construed as conferring jurisdiction on circuit courts to adjust the claims of the executors or administrator for his services and expenses against the estate in his hands.

Stephens v. Cassity, 77 S.W. 1089, 104 Mo.App. 210.

Mo.App. 1926. Probate court had jurisdiction of action against estate of deceased surety or guarantor.

McConnon & Co. v. Kuhlmann, 278 S.W. 822, 220 Mo.App. 821.

⇐436. Venue.

Mo. 1934. Statute providing that all orders, settlements, trials, and other proceedings contemplated for settlement and distribution of estate of decedent shall be had in county in which letters testamentary or of administration were granted, *held* to relate only to proceedings in probate court, and is inapplicable to suit in circuit court to establish demand against estate. Mo.St.Ann. § 5, p. 7, V.A.M.S. § 461.020.

State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107.

Circuit court of county in which estate was being probated, in suit to establish claim against estate, *held* not to have jurisdiction of persons of executors of decedent's will, and devisees and legatees under will, even though such defendants, nonresidents of county, were served by summons in another county. Mo.St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107.

Mo.App. 1922. Rev.St.1919, § 5, V.A.M.S. § 461.020, relates only to the administration of estates in the probate court, and does not require an action to recover damages for decedent's wrongful death brought under Rev.St. 1919, § 1180, V.A.M.S. § 508.040, to be brought in the county where the administratrix was appointed.

Yarde v. Hines, 238 S.W. 151, 209 Mo. App. 547.

Mo.App. 1939. A statute providing that all orders, settlements, trials, and other proceedings contemplated for settlement and distribution of estate of deceased shall be had in county in which letters testamentary or of administration were granted, related only to proceedings in probate court, and was inapplicable to suit in circuit court to establish demand against estate. Mo.St.Ann. § 5, p. 7, V.A.M.S. § 461.020.

Sanders v. Savage, 129 S.W.2d 1061, 234 Mo.App. 9.

⇐437. Time to sue, and limitations.

⇐437(1). Actions by executors or administrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐437(2). Time within which actions against executors or administrators are prohibited.

Mo. 1827. A creditor of one estate has not five years within which to establish a simple contract debt after the death of the intestate or testator, if the claim was previously due.

Labeaume v. Hempstead, 1 Mo. 772.

Mo. 1843. A. brought his bill against the administrators of B., setting forth that he, with others, became the sureties of B. on his bond as collector of the revenue, and that more than three years after the death of B., who was insolvent, a judgment had been obtained against him on the bond, all of which he had been compelled to pay, his co-sureties being insolvent, and prayed that the funds in the administrator's hands might be paid over to him, and distribution enjoined. *Held*, that the claim was not barred by the three-years statute of limitations, requiring claims to be made within three years.

Miller v. Woodward, 8 Mo. 169.

Mo. 1845. The statute requiring actions against administrators to be brought within three years after the grant of letters of administration does not apply to suits on causes of action which do not accrue until after the letters have been granted, in which case suit may be brought within three years after the cause of action accrued.

Finney v. State, to Use of Estiss, 9 Mo. 227.

For references to other topics, see Descriptive-Word Index

Mo. 1847. The limitation of three years for the presentation of demands against the estate of deceased persons applies to suits in all other courts, as well as to those before the county court, and supersedes the general statutes on the same subject.

Montelius v. Sarpy, 11 Mo. 237.

Mo. 1866. To a suit by a distributee for his share against an administrator holding the fund in trust the statute of limitations does not apply. No lapse of time is a bar to an action upon a direct trust or a fraud, as between trustee and beneficiary.

Dillon's Adm'r v. Bates, 39 Mo. 292.

Mo.App. 1880. Where an administrator published no legal notice of the grant of letters of administration, an alleged actual notice to a creditor of intestate amounts to nothing, and a suit on the creditor's claim arises upon the general limitation of five years.

Doerge v. Heimenz, 8 Mo.App. 255.

Mo.App. 1887. Under V.A.M.S. § 464.-020, providing that all demands not exhibited against the estate of a decedent within two years shall be forever barred, a claim not so exhibited was barred, although during that time the person in whose favor the claim existed was dead and no administrator had been appointed for his estate.

Nelson v. Haeberle, 26 Mo.App. 1.

⇐437(3). Bar of actions against executors and administrators in general.

Mo. 1845. The statute does not apply where the administrator has not given notice of the grant of his letters of administration.

Wiggins v. Lovering's Adm'r, 9 Mo. 262.

Mo. 1846. An administrator is a trustee, and cannot set up the statute of limitations in bar to the next of kin or persons entitled to the distribution of the assets.

Rubey v. Barnett, 12 Mo. 3, 49 Am.Dec. 112.

Mo. 1855. Where an administrator, at a fraudulent sale of negroes made by him, purchases them, and afterwards openly and notoriously, with the knowledge of the heirs, asserts title in himself, the statute of limitations is a bar to a bill brought by the heirs for their relief after action was barred at law.

Keeton's Heirs v. Keeton's Adm'r, 20 Mo. 530.

Mo. 1871. An action against an administrator for a wrongful appropriation of the funds of the estate to his own use may be maintained, under Wag.St. p. 77, §§ 47, 48, before final settlement of the estate by the county court.

State, to Use of Shields, v. Flynn, 48 Mo. 413.

Mo. 1898. Administration Law (section 184), providing that "all demands not * * * exhibited and presented to the court for allowance in two years shall be forever barred," does not apply to an action by remainder-men to establish their rights as owners of a fund in the administrator's hands, which was derived from a conversion by decedent, who was the particular tenant, of a part of the estate into money.

Bramell v. Adams, 47 S.W. 931, 146 Mo. 70.

Mo. 1947. That period of one year for exhibiting claims against vendor's estate had run was immaterial, where purchaser seeking to quiet title alleged conspiracy and fraud on part of defendants claiming the property and did not seek monetary recovery against vendor's estate. Mo.R.S.A. §§ 182, 186, V.A.M.S. §§ 464.020, 464.040.

Hamilton v. Linn, 200 S.W.2d 69, 355 Mo. 1178.

Mo.App. 1876. Where suit was begun against the defendant, who died before its termination, and the action, though being one that survived his death, was not recommenced against his administrator within one year from the date of the grant of letters of administration, and the claim was then barred by the general statute of limitations, no action could thereafter be maintained thereon.

Doerge v. Heimenz, 1 Mo.App. 238.

Mo.App. 1886. The proceedings against executors and administrators, authorized by Rev.St.1879, §§ 282 (Repealed, Laws 1909, p. 99), 285, V.A.M.S. § 465.230, relating to proceedings against executors and administrators and their sureties, cannot be invoked until after the final settlement.

Ridgway v. Kerfoot, 22 Mo.App. 661.

Mo.App. 1924. An action against an estate to recover money paid under a contract to purchase land made with decedent after refusal of his heirs to perform *held* barred by Rev.St.1919, § 182, V.A.M.S. § 464.020, where demand was not presented or suit instituted within a year after the date of such refusal, when plaintiff's right to sue became absolute, and the suit was not maintainable on the theory that the administrator had received payment sought to be recovered as a trustee.

Grigg v. Lively, 257 S.W. 187, 214 Mo. App. 473.

Mo.App. 1928. Statute barring suits against estate unless brought within one

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year after notice of granting of letters of administration *held* not to bar suit to establish resulting trust. V.A.M.S. §§ 464.010, 464.020.

Clay v. Walker, 6 S.W.2d 961.

⇐437 (4). Computation of period of limitation in general.

Mo. 1854. Limitation only begins to run against an administrator from the date of the letters granted.

Polk's Adm'r v. Allen, 19 Mo. 467.

Mo. 1854. Limitations run against the distributee of an estate from the date of a final settlement and an order of distribution.

State, to Use of Whaley, v. Blackwell, 20 Mo. 97.

Mo. 1872. The law allows five years wherein to contest a will in the circuit court, and until that time has passed the rights under the will are not finally settled, though it is probated in the county court, and until after that time the statute of limitation does not begin to run against the heirs.

Tapley v. McPike, 50 Mo. 589.

Mo. 1873. The statute of limitations commences running in favor of the estate of a deceased person only from the grant of letters, and a claim against the estate may, under the administration law, be proved up within two years thereafter. But, where the claim would otherwise be barred by the general limitation law, this period of two years cannot be grafted upon the statute as an extension of time. Thus where, in case of a promissory note, the grant of letters was less than ten years from its date, and the demand was exhibited less than two years afterwards, but more than ten years from the date of the paper, the demand will be barred.

McKinzie v. Hill, 51 Mo. 303, 11 Am. Rep. 450.

Mo. 1874. The failure to give notice of the grant of letters of administration only does away with the special three years' limitation. The general law begins to run in favor of the estate from the date of the letters.

Ayers v. Donnell, 57 Mo. 396.

Mo. 1888. Where an administrator completes payment under a contract for the purchase of real estate by deceased, and takes the title "as administrator," and makes final settlement, and receives his discharge, and thereafter continues to occupy the land under claim of title, the statute of limitations begins to run in his favor from the date of his discharge.

Harney v. Donohoe, 10 S.W. 191, 97 Mo. 141.

Mo. 1894. Where the administrator pleads the special statute of limitations, he must aver the giving of notice of the grant of letters of administration, and make proof of such allegations on the trial.

Munday v. Leeper, 25 S.W. 381, 120 Mo. 417.

Mo. 1906. A contingent liability on a contract of guaranty became fixed October 18, 1902. One of the guarantors died in 1899, and about August 1, 1899, notice of letters of administration was published, stating that all claims not presented within two years would be barred. *Held*, that the limitations prescribed in Rev.St.1899, § 185, V.A.M.S. § 464.020, providing that all demands against the estate of a deceased person not presented within two years after publication of the notice of letters of administration should be barred, did not begin to run until October 18, 1902, and action on the guaranty was not barred on February 19, 1903.

Binz v. Hyatt, 98 S.W. 637, 200 Mo. 299.

Mo.App. 1876. Though, in the absence of notice of the granting of letters on the estate of a deceased person, the special statute limiting the time within which claim shall be filed against an estate to one year does not begin to run, such fact does not prevent the general statute of limitations from running against the claim; and, if the claim is barred by such statute, no action can be maintained thereon, though no notice of the granting of the letters was published.

Doerge v. Heimenz, 1 Mo.App. 238.

Mo.App. 1924. A claim for services rendered to decedent while living in his home before claimant's marriage and removal therefrom *held* not barred by the statute of limitations because of a break of about three years in the continuity of such services before her return and resumption thereof, in view of testimony from which the jury reasonably might have concluded that deceased intended to pay her in the future for all she had done.

Smith v. Sims, 258 S.W. 1032.

Mo.App. 1928. Plaintiff's cause of action for services not to be paid for until decedent's death did not run until decedent's death.

Blackwell v. De Arment's Estate, 300 S. W. 1035.

For references to other topics, see Descriptive-Word Index

⇐437(5)-437(6).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐437 (7). Presentation and allowance or rejection of claim.

C.A.Mo. 1949. Under federal rule, action against executrix for care and support of child was commenced on date that complaint was filed, but filing of complaint did not constitute an exhibition of the plaintiff's demand against the estate within Missouri statutes which required that summons and complaint be served upon executrix within one year from date on which letters testamentary were issued. Federal Rules of Civil Procedure, rules 3, 4(d) (1, 7); Mo.R.S.A. §§ 182, 184, 185, 847.27, V.A.M.S. §§ 464.020, 464.030, 464.070, 506.150.

Zuckerman v. McCulley, 170 F.2d 1015.

Mo. 1914. Though a suit against an executrix, brought within the period of limitations prescribed by the general and special statutes, was dismissed, the suit was an exhibition of the claim which removed the bar of the special statute leaving the claim subject thereafter only to the general statute of limitations.

Knisely v. Leathe, 166 S.W. 257, 256 Mo. 341.

Mo.App. 1920. Where letters of administration were granted over four years before the administratrix commenced equitable suit against the heirs to secure allowances to her for claims against deceased paid without having been approved as required by statutes, such claims, not having been exhibited or allowed, were barred by Rev.St.1909, § 191, V.A.M.S. § 464.020, so that the suit thereon could not be maintained.

Thompson v. Thompson, 217 S.W. 863.

Mo.App. 1938. Where no written notice containing copy of instrument of writing or account on which claim was founded was given to administrator within one year of grant of letters, no action could be followed up at the next succeeding term. Mo.St.Ann. §§ 187, 195, 196, pp. 117, 128, 130, V.A.M.S. §§ 464.040, 464.150, 464.160.

Curtin v. Woolley, 114 S.W.2d 191.

Where claimant against decedent's estate exhibited her demand to administrator as required by statute and filed claim in probate court, but did not serve on administrator written notice containing copy of instrument or account on which claim was founded, and administrator did not waive notice, action brought more than two years after death of decedent against those, who allegedly held decedent's property in trust for decedent, was barred by one-year limitation, notwithstanding that estate had been ordered closed without publication of notice of final settlement. Mo.St.Ann. §§ 183, 186, 195, 196, 197, pp. 111, 115, 128, 130, V.A.M.S. §§ 464.020, 464.030, 464.150, 464.160, 464.190.

Curtin v. Woolley, 114 S.W.2d 191.

⇐437(8). Rights as against new or uninventoried assets.

For cases from other jurisdictions, see other Key Number Digests.

⇐438. Parties.

⇐438(1). In general.

U.S.Mo. 1868. In a bill against an administrator for misconduct in administration, the sureties on his bond may be joined as parties, when, if on settlement a balance should be found due the estate, they would be liable on their bond.

Payne v. Hook, 74 U.S. 425, 7 Wall. 425, 19 L.Ed. 260.

U.S.Mo. 1871. A bill to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover his share, is not a suit in which all others interested in the estate can be heard, unless they are made parties or make themselves parties in some appropriate mode.

Hook v. Payne, 81 U.S. 252, 14 Wall. 252, 20 L.Ed. 887.

Mo. 1946. Where petition by widow as sole devisee and executrix of husband's estate attempted to state a joint cause of action in favor of widow as individual and as executrix, and any damages recoverable could only accrue to plaintiff as an individual, petition was demurrable for misjoinder of parties plaintiff, regardless of whether a cause of action was stated in favor of plaintiff in either capacity. Mo.R.S.A. § 922, V.A.M.S. §§ 507.050, 509.290, 509.300, 509.340.

Moffett v. Commerce Trust Co., 193 S.W.2d 588, 354 Mo. 1098, appeal dismissed 67 S.Ct. 82, 329 U.S. 669, 91 L.Ed. 590, rehearing denied 67 S.Ct. 184, 329 U.S. 827, 91 L.Ed. 702.

Mo.App. 1876. Wag.St. p. 71, § 5, provides that no married woman shall be executrix or administratrix. Page 75, § 34, provides that, if an executrix marry, her husband shall not acquire any interest in the effects of her testator, but the marriage shall extinguish her power. *Held*, in an action by an executrix, where her marriage was entered upon the record, it was error to permit her to proceed further as a plaintiff representing the estate of testator, who was her former husband; nor could she re-

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cover in the suit by virtue of any individual interest which she had in the controversy.

Vielhaber v. Eyermann, 1 Mo.App. 115.

⇐438 (2). Making executor or administrator defendant upon refusal to sue.

For cases from other jurisdictions, see other Key Number Digests.

⇐438 (3). Executor or administrator as both plaintiff and defendant in same action.

Mo.App. 1887. In an action by the heirs of W. against the administrator of J. to recover a claim due from the estate of J. to the estate of W., defendant, who is also one of the heirs of W., cannot be joined as a plaintiff.

Clark v. Crosswhite, 28 Mo.App. 34.

⇐438 (4). Joinder of coexecutors or coadministrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐438 (5). Legatees, heirs, and distributees as parties in general.

C.C.A.Mo. 1947. Remaindermen had no right of action for damages against executor for defending in Illinois courts probate of Missouri will revoked as to Illinois realty by subsequent marriage of testator, since litigation was conducted by executor in defense of trust estate established by will to which by terms of will remaindermen would succeed upon death of life beneficiaries. S.H.A. ch. 3, § 197.

Sternberg v. St. Louis Union Trust Co., 163 F.2d 714, certiorari denied 68 S. Ct. 267, 332 U.S. 843, 92 L.Ed. 414.

Mo. 1856. When a bond has been given for the conveyance of land, and notes taken for the purchase money, the heirs as well as the administrators of the vendor are proper parties to a suit to recover payment of the notes.

Perry's Adm'r v. Roberts, 23 Mo. 221.

Mo. 1856. An intestate's heirs cannot be joined as plaintiffs with the administrator in a suit for the recovery of damages for the breach of a contract to convey land to the intestate.

Brueggeman v. Jurgensen, 24 Mo. 87.

Mo. 1877. In a suit to set aside a sale of lands made by an administrator for the purpose of paying the purchase price remaining unpaid thereon, the heirs of decedent are not necessarily parties to the determination of the question involved in the suit, since they had no interest which could be affected by any decree that might be rendered.

Garrett v. Bicknell, 64 Mo. 404.

Mo. 1878. Where the administrator of a vendor of real estate, who has died without making a conveyance, brings suit to enforce the vendor's lien for the unpaid purchase money, the heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from the heirs to the vendee, unless the latter accept the deed.

Leeper v. Lyon, 68 Mo. 216.

Mo. 1944. Heirs of deceased grantor were neither "necessary" nor "proper parties" to an action against surviving spouse and administratrix of deceased's estate to set aside as fraudulent a conveyance from deceased to surviving spouse. Mo.R.S.A. § 3507, V.A.M.S. § 428.020.

Herriman v. Creason, 181 S.W.2d 502, 352 Mo. 1176.

Mo.App. 1916. Where legatees and devisees were not named, as parties, but administrator was so named, there was no defect of parties as to legatees, whom the administrator represented.

Buck v. Meyer, 190 S.W. 997, 195 Mo. App. 287.

⇐438(6). Recovery and protection of property of estate in general.

Mo. 1942. The statutes granting widower a share in realty and personalty belonging to wife at time of her death did not render widower a "necessary and proper party" in a proceeding for collection of a claim allegedly due deceased wife from estate of her deceased mother. Mo.R.S.A. §§ 94, 323, 324, V.A.M.S. §§ 462.140, 469.070, 469.130.

Niederberg v. Golluber, 162 S.W.2d 592.

A widower, in his individual capacity, was not a "necessary and proper party" to an action to recover for alleged conversion of certain stocks belonging to estate of deceased wife, but the right to recover therefor was vested by statute in administrator. Mo.R.S.A. §§ 63 et seq., 98, V.A.M.S. §§ 462.-400 et seq., 537.010.

Niederberg v. Golluber, 162 S.W.2d 592.

Widower, in his individual capacity, was not a "necessary and proper party" to an action to recover for alleged conversion of certain specific personal assets belonging to estate of deceased wife, even though it was alleged that proceeds of sale of such assets were invested in a company and that widower as beneficiary could elect to take such property itself, where petition did not purport to make heirs of deceased wife parties to the proceeding, and did not contain any allegation that assets of estate exceeded its liabilities.

Niederberg v. Golluber, 162 S.W.2d 592.

Mo.App. 1907. A son by means of fraud induced his father to transfer his personalty to him. After the father's death the son retained possession, and proceeded to administer the same for his own benefit. The father's heirs were adults, and there were no debts against his estate. *Held*, that the administrator of the father and not the heirs was entitled to sue the son for his conversion of the father's property.

Griesel v. Jones, 99 S.W. 769, 123 Mo. App. 45.

Mo.App. 1934. Joinder of heirs of devisee of interest in resulting trust in suit against executor of holder of legal title to realty after sale of realty to establish devisee's interest *held* proper where petition disclosed all the facts, though petition erroneously characterized the claims of plaintiffs as a joint demand.

Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.

⇐438(7). Actions on claims against estate.

For cases from other jurisdictions, see other Key Number Digests.

⇐438(8). Actions concerning real estate.

Mo. 1892. In a creditors' bill to charge certain real estate held in the name of a wife and alleged to have been conveyed to her by her husband for the purpose of defrauding creditors, the administrator of the deceased husband was not a proper party, as neither the deceased nor his administrator could attack or impeach the validity of the deeds under which the title to the land was vested in the wife.

Crook v. Tull, 20 S.W. 8, 111 Mo. 283.

Mo. 1897. In an action against minors for partition of lands devised to them, brought before the settlement of the estate, the executor is a proper party defendant.

Budde v. Rebenack, 38 S.W. 910, 137 Mo. 179.

Mo. 1897. A general power in the will to sell real estate does not give the administrator with the will annexed such an interest as makes him a necessary party to an ejectment suit.

Estes v. Nell, 41 S.W. 940, 140 Mo. 639.

Mo. 1902. Rev.St. § 658, V.A.M.S. §§ 507.030, 507.050, provides that, when a complete determination cannot be had, the court may order other parties to be brought in. Section 4518a provides that when a wife shall die without any child or descendants in being, capable of inheriting, her widower shall be entitled to one-half of her estate absolutely, subject to her debts. A husband claimed an interest in realty, and filed a paper renouncing the will. The executor of the wife sued to quiet title. *Held* that, all the legatees not being parties, it was error for the court to enter judgment without bringing them in.

Spurlock v. Burnett, 70 S.W. 870, 170 Mo. 372.

Mo. 1944. In grantor's action against grantee's executrix to have deed decreed an equitable mortgage, executrix who was the owner of the land as well as the widow and personal representative of grantee, in court's discretion, was entitled to intervene in the other capacities.

Brewster v. Terry, 180 S.W.2d 600, 352 Mo. 967, transferred 172 S.W.2d 5.

⇐438(9). Foreclosure of liens and mortgages.

Mo. 1877. In an action by the administrator of a vendor to enforce the vendor's lien, persons to whom the administrator had sold a part of the land under order of the court were proper parties defendant.

Chapman v. Callahan, 66 Mo. 299.

Mo. 1889. Under Gen.St.1865, § 4, p. 618, providing that in case of the death of a mortgagor, whether before or after action brought, his personal representative shall be made defendant, where the mortgagor is dead, his personal representative is the only necessary party defendant to the foreclosure suit.

Hall v. Klepzig, 12 S.W. 372, 99 Mo. 83.

⇐438(10). Enforcement or rescission of contracts of deceased.

Mo.App. 1913. A husband and wife who rendered services to the wife's parent under an implied agreement for compensation could join in an action against his estate to enforce such contract.

Burt v. Gabbert, 160 S.W. 838, 174 Mo. App. 521.

Mo.App. 1935. Administrator of wife's estate *held* proper party to recover fund due wife as beneficiary of fraternal benefit certificate on husband's life.

Foster v. Fraternal Aid Union, 87 S.W. 2d 669, 230 Mo.App. 477.

Mo.App. 1950. In absence of any allegation of debts due creditors of insured and without any creditors as plaintiffs, administratrix of estate of deceased insured could not maintain a creditor's bill to recover proceeds of certain life policies on theory that premiums were paid in fraud of creditors.

Runnion v. Paquet, 233 S.W.2d 803.

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⚖438(11). Action to recover legacy or distributive share.

U.S.Mo. 1868. In a bill in equity by one of the distributees of an intestate against an administrator and his sureties, the other distributees need not be joined as parties if the court can do substantial justice to the parties before them without injury to absent parties equally interested.

Payne v. Hook, 74 U.S. 425, 7 Wall. 425, 19 L.Ed. 260.

U.S.Mo. 1871. In a suit by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties of all who were entitled to distribution, nor authorize a decree in their favor.

Hook v. Payne, 81 U.S. 252, 14 Wall. 252, 20 L.Ed. 887.

⚖439. Joinder or intervention in actions by others.

Mo. 1913. In a suit by a devisee to determine title to real estate, the executor, authorized by order of the probate court to take possession and rent the land, is a proper party plaintiff, within Rev.St.1909, § 2535, V.A.M.S. § 527.150, authorizing any person claiming any interest in real estate to sue to determine title.

Spicer v. Spicer, 155 S.W. 832, 249 Mo. 582, Ann.Cas.1914D, 238.

Mo. 1943. Where intestate's real and personal interests are intermingled, in the same suit, the administrator may bring, defend, or join in the action.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo. 1942. Where there was no allegation that deceased's realty or any of income therefrom had been or would be needed to pay deceased's debts, administrator of deceased's estate was not a "necessary or proper party" to a proceeding to recover rental value of deceased's realty which accrued subsequent to deceased's death. Mo.R.S.A. § 129, V.A.M.S. § 462.280.

Niederberg v. Golluber, 162 S.W.2d 592.

The administrator of estate of decedent and widower and heirs were not "united in interest" in their claims for rental value of realty allegedly held in trust for decedent, so as to authorize their joinder as plaintiffs in an action to enforce their claims, since administrator's claim would be for rental value accruing prior to decedent's death, whereas claim of widower and heirs would be for rentals accruing after decedent's death. Mo. R.S.A. §§ 129, 318, 319, 324, 851–853., V.A.M. S. §§ 462.280, 469.010, 469.020, 469.130, 507.-030, 507.040.

Niederberg v. Golluber, 162 S.W.2d 592.

Mo.App. 1897. An administrator of a deceased judgment debtor is not a necessary party defendant to a proceeding to revive the judgment against heirs of the decedent, under Rev.St.1889, § 6024, V.A.M.S. § 511.-550, where the judgment creditor seeks by the revival proceedings to affect land only.

Stewart v. Gibson, 71 Mo.App. 232.

Mo.App. 1927. In action on life policy by mother of deceased, making administrator party plaintiff after all evidence was in, but before submission to jury, *held* proper. V.A.M.S. § 509.500.

Craig v. Metropolitan Life Ins. Co., 296 S.W. 209, 220 Mo.App. 913.

Mo.App. 1928. Administrator *held* not necessary party in heir's action to impress land with resulting trust, where ancestor left no debts.

Clay v. Walker, 6 S.W.2d 961.

Mo.App. 1932. Administratrix possessed of personal estate *held* necessary party to suit by one claiming to own entire estate.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Administratrix in possession of personal estate *held* justified in defending suit of one claiming to own entire estate to court of last resort at expense of estate. Rev.St.1929, § 94, V.A.M.S. § 462.140.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

Mo.App. 1937. Under will creating an estate in land for years with directions that land be sold at termination thereof by executor and proceeds divided among certain beneficiaries, administratrix who succeeded executor was not a "necessary party" to suit by beneficiary who had elected, by bringing suit in partition, to reconvert realty from personalty into realty after other benficiary had also made such an election, since administratrix never had any vested title to land but only a naked right to sell.

Holmes v. Scott, 105 S.W.2d 966, 231 Mo.App. 690.

Mo.App. 1949. Where insane person died, the guardianship terminated, and guardian was without further power except to settle his accounts and deliver estate and effects of his ward to ward's personal representative who had sole authority to represent estate and such personal representative was properly substituted for ward's guardian in action against guardian on suggestion of ward's death.

Evans v. York, 216 S.W.2d 124.

For references to other topics, see Descriptive-Word Index

⇐440. Removal or death pending action.

Mo. 1891. On the death of a foreign administrator pending a suit in this state on a judgment obtained by him in the state in which he was appointed, the suit may be revived in the name of his administrator.

Tittman v. Thornton, 17 S.W. 979, 107 Mo. 500, 16 L.R.A. 410.

Mo. 1891. Jurisdiction to assess damages on an injunction bond against a public administrator and his sureties, is not lost by the revocation of the letters of administration pending the motion to assess the same, and an order that the "cause now proceed in the name of" the substituted administrator.

Nolan v. Jones, 18 S.W. 1107, 108 Mo. 431.

⇐441. Process and appearance.

Mo. 1857. Where, on a party's decease, the appearance of his representative was made without notice to the opposite party, the omission of notice was cured by the subsequent appearance of both parties.

Farrell's Adm'r v. Brennan's Adm'x, 25 Mo. 88.

Mo. 1919. Return, showing on its face service of summons upon M., does not show that M. was served as administratrix.

Bostick v. McIntosh, 213 S.W. 456, 278 Mo. 395.

Mo. 1946. Where cause of action abated on defendant's death, court had no jurisdiction of subject-matter, and such jurisdiction could not be waived or conferred by consent of executor of decedent's estate, as by entry of general appearance.

Johnson v. Frank, 191 S.W.2d 618, 354 Mo. 767.

⇐442. Pleading.

⇐443. —— In general.

⇐443 (1). In general.

Mo. 1875. A petition in a suit by a widow against the administrator of the deceased husband to recover the amount paid for taxes by her on the estate, which alleges that the administrator failed to pay the taxes on the real estate of the decedent for two years, that it was his duty to pay the taxes, having ample funds to do so, and that he suffered the lands to be returned as delinquent, and that plaintiff, having an interest in the estate, paid the taxes to prevent a sale for nonpayment, alleges no facts showing the administrator to be exempt from the duty of paying taxes imposed by the fourteenth section of the fourth article of the administration law, requiring administrators to pay taxes due the state or county or incorporated town.

State, to Use of Moore, v. White, 61 Mo. 441.

Mo. 1903. A petition in an action by an administrator to recover personalty from the heirs of decedent, which does not describe the personalty, is fatally defective.

Union Trust Co. v. Soderer, 72 S.W. 499, 171 Mo. 675.

Mo.App. 1881. Sufficiency of bill, setting forth that the administrator of an estate confederated with others to represent the estate as insolvent, in consequence of which plaintiffs sold their demands against the estate for less than their face value. See, Levering v. Schnell, 9 Mo.App. 583, memorandum.

⇐443 (2). Matters of defense in general.

Mo. 1845. Under a statute directing that all demands against the estate of a deceased person shall be presented for allowance within three years from the date of letters of administration, a plea which alleged that suit was not brought within three years from the granting of letters of administration was bad, since it should have alleged that the cause of action had accrued more than three years before suit was brought.

Finney v. State, to Use of Estiss, 9 Mo. 227.

Mo. 1845. A plea of the statute by an administrator must aver that notice was given.

Wiggins v. Lovering's Adm'r, 9 Mo. 262.

Mo. 1881. In an action by an administrator de bonis non to recover the amount of a deposit by deceased, a defense alleging that the sum on deposit at the death of deceased was paid to the administrator, who then redeposited it in his own name, is inconsistent with a defense alleging that the amount of the deposit was paid out in divers sums on plaintiff's orders.

Smith v. Culligan, 74 Mo. 387.

Mo.App. 1920. Where a claim originated in the probate court, where formal pleadings are not required, it is sufficient that the record shows the administrator relied on limitations and objected to the claim on that account, and even in cases originating in the circuit court the general statute need not be pleaded by an administrator.

Greever v. Barker, 223 S.W. 1087, 204 Mo.App. 190.

Mo.App. 1927. Answer pleading that if plaintiff had claim against estate it was paid *held* not to plead a counterclaim required to be filed in probate court, V.A.M.S. §§ 509.420, 509.430.

Markowitz v. Markowitz, 290 S.W. 119.

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⇐443 (3). Allegation or denial of title or authority.

Mo. 1883. A petition in an action by an administrator against a bank to recover on a certificate of deposit issued by the bank to the administrator's intestate, which alleges that the certificate of deposit was payable to the intestate, sufficiently shows that the intestate was the holder and owner of the certificate entitling the administrator to sue thereon.

Eans' Adm'r v. Exchange Bank, 79 Mo. 182.

Mo. 1892. Where, in a suit by a public administrator, he alleged his election and qualification as such, and that he had taken charge of the estate, and filed notices thereof in the probate court, it could not be objected that his petition stated no cause of action because it did not show his authority to take charge of the estate.

Leeper v. Taylor, 19 S.W. 955, 111 Mo. 312.

Mo.App. 1910. A petition in replevin, which described defendant as executrix, and which alleges the death of decedent, the granting of letters testamentary to defendant, and her qualifying as executrix and acting as such, and which alleges plaintiff's ownership of the property in controversy, and defendant's refusal to surrender the same on demand, when considered in connection with the summons directed against defendant as executrix, states a cause of action against defendant as executrix, and not an action against her individually.

White v. McFarland, 128 S.W. 23, 148 Mo.App. 338.

⇐443 (4). Averment of jurisdictional facts.

For cases from other jurisdictions, see other Key Number Digests.

⇐443 (5). Allegation or denial of indebtedness.

Mo. 1899. Where, in an action by decedent's cousin for services as housekeeper, defendant denied the debt, and charged that plaintiff lived with the family of decedent while the services were rendered, which, if any, were rendered gratuitously as a member of the family, and without expectation of plaintiff of charging or deceased of paying therefor, and that deceased considered plaintiff a member of his family, and furnished her with clothing and board, and as such bequeathed her an annuity, an instruction that under the pleadings it was admitted that the only compensation plaintiff received from deceased for her services was her board and clothing, and that defendant was bound by such admission, was proper.

Sprague v. Sea, 53 S.W. 1074, 152 Mo. 327.

Mo. 1936. In proceeding to establish note as demand against decedent's estate, plea of non est factum by executors *held* sufficient. Mo.St.Ann. § 966, p. 1239, V.A.M.S. §§ 509.100, 509.220, 509.240.

Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465.

Mo. 1952. The defense to action for value of services rendered that family relationship existed between plaintiff and person to whom services were rendered so as to give rise to presumption that services were gratuitous is special and affirmative and must be pleaded. V.A.M.S. § 509.090.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1938. A complaint, alleging that plaintiff's mother-in-law during her lifetime was adjudged insane, that a guardian was appointed but that the guardian failed to perform his duties, that during such period plaintiff received her mother-in-law into her home and nursed and cared for the mother-in-law with the understanding that, at mother-in-law's death, plaintiff would be paid the reasonable value of such services, stated a cause of action at common law against administrator of mother-in-law's estate on an implied contract for the reasonable value of such services and was not demurrable on ground that it stated a cause of action on an express contract against an insane person notwithstanding it alleged an agreement by mother-in-law to pay for the services. Mo.St.Ann. § 486, p. 296, V.A.M.S. § 458.490.

Tock v. Tock, 120 S.W.2d 169.

Mo.App. 1950. In absence of any allegation of debts due creditors of insured and without any creditors as plaintiffs, administratrix of estate of deceased insured could not maintain a creditor's bill to recover proceeds of certain life policies on theory that premiums were paid in fraud of creditors.

Runnion v. Paquet, 233 S.W.2d 803.

⇐443(6). Allegation or denial as to assets and claims against estate.

Mo. 1862. A petition by an administrator in a creditors' suit alleged that a note on which his intestate was surety had been proven against the estate of the principal therein and the estate of petitioner's intestate; that a large part of the claim had been paid by petitioner as administrator; that the estate of the principal was exhausted, and that there

was nothing with which to pay petitioner for the amount paid out by him; that during his lifetime defendant's intestate, with intent to hinder, delay, and defraud his creditors, bought and paid for a tract of land, and caused the title thereof to be conveyed to his brother, who is joined herein as defendant; and that the brother subsequently conveyed it to another defendant, who also had notice of the fraud. Petition prayed that plaintiff, as administrator, have judgment against the estate of the principal obligor for the amount paid by him on the claim, and also for the unpaid balance allowed against his intestate's estate, and praying that the administrator make disclosure of the condition of his decedent's estate, and that the tract of land be sold to pay off plaintiff's claim. *Held*, that the petition stated a cause of action against each of the defendants.

Young v. Wells, 33 Mo. 106.

Mo. 1880. A petition against an administrator, filed by the representative of the only heir and distributee of the intestate to recover assets of the estate for which the administrator had refused to account, was fatally defective, where it did not state that there were no creditors of the estate and that the fund which defendant had wasted was not applicable to the payment of any debt due from the estate.

Foster v. Kenrick, 71 Mo. 422.

Mo.App. 1880. Allegation as to assets. See,

Roberts v. Garesche, 8 Mo.App. 592, memorandum.

Mo.App. 1902. An allegation that defendant owed decedent's estate "over and above any indebtedness on the part of decedent to defendant," even if construed as an admission that decedent was indebted to defendant, did not show any lien or right of possession, in defendant which plaintiff was bound to prove had been satisfied.

Richardson v. Moffit-West Drug Co., 69 S.W. 398, 92 Mo.App. 515.

⇐443(7). Allegation or denial as to conditions precedent.

Mo. 1834. An administrator with the will annexed, suing for a breach of covenant made to his testator to convey land, ought to allege in his declaration a request to the covenantor to convey land to the person or persons to whom the same belongs, whether it be devised or descend to the heir at law.

Laberge v. McCausland, 3 Mo. 585.

Mo.App. 1932. Jurisdiction to allow claim against estate sufficiently appears from answer that alleges allowance was made by probate court of county in which estate was pending.

St. Louis Law Printing Co. v. Aufderheide, 45 S.W.2d 543, 226 Mo.App. 680.

⇐443 (8). Verification.

An administrator cannot deny the execution of a writing sued, purporting to have been executed by his intestate, unless it be by plea, supported by affidavit; and the plaintiff is not otherwise bound to prove it.

Mo. 1827. Vincent v. Pitman, 1 Mo. 712.

Mo. 1835. Foster v. Nowlin, 4 Mo. 18.

Mo. 1930. Answer denying execution of note in suit based thereon against maker's administratrix need not be verified as prerequisite to defense of nonexecution. Rev.St. 1919, §§ 1415, 1416, V.A.M.S. §§ 525.200, 525.210.

State Bank of Anderson v. Dunn, 29 S.W. 2d 79, 325 Mo. 709.

Where maker's administratrix, when sued on note in unverified answer, denied execution, proof of execution *held* necessary prerequisite to admission of note in evidence. Rev.St.1919, §§ 1415, 1416, V.A.M.S. §§ 525.200, 525.210.

State Bank of Anderson v. Dunn, 29 S. W.2d 79, 325 Mo. 709.

Mo.App. 1927. In action against maker's administrator, plaintiff must offer proof of execution of notes sued on, though not denied. V.A.M.S. §§ 509.100, 509.220.

Courtney's Estate v. Lanznar's Estate, 296 S.W. 269.

⇐444. —— Allegation and denial of representative capacity.

⇐444 (1). In general.

Mo. 1873. In a suit by a public administrator, the body of the petition should show his authority to bring the action. Matters set forth in the caption will not obviate defects in that regard.

Headlee v. Cloud, 51 Mo. 301.

Mo. 1907. In a suit by an administrator, a general denial does not put him to proof of his appointment.

Gross v. Watts, 104 S.W. 30, 206 Mo. 373, 121 Am.St.Rep. 662.

Mo. 1934. Where answer, which was general denial, followed by specific denials and other allegations, nowhere denied that defendants were executors and referred to defendants as executors, answer conceded that defendants were executors.

State ex rel. Talbott v. Shain, 66 S.W. 2d 826, 334 Mo. 617.

Mo.App. 1902. Where the order of the probate court, denying letters of administra-

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tion and turning over all the assets of the deceased to his widow, vested in her the powers and duties of an executrix, if, as such, she had no legal right to sue for the surplus arising from a sale under a trust deed, that fact was apparent on the face of the petition, and defendants should have taken advantage of the defect by demurrer, or it was waived.

Warfield v. Hume, 91 Mo.App. 541.

⇐444 (2). Requisites and sufficiency in general.

Mo. 1854. A petition stating the character in which the plaintiff sued (as administratrix), and the indebtedness to her intestate, and praying judgment as administratrix for the debt, is a sufficient statement of the cause of action and of her right to sue, under Code, art. 6, § 1.

Duncan's Adm'r v. Duncan, 19 Mo. 368.

Mo. 1868. Where, in the title to a petition, the plaintiff is described as the administrator of W., and in the body of the petition it is averred that he is the acting and lawful executor of the last will and testament of W., the averment in the petition is amply good, in the absence of any objection, to sustain the cause; and the description of administrator in the title may be wholly disregarded.

Fuggle v. Hobbs, 42 Mo. 537.

Mo. 1874. A petition in an action by executors on a note payable to their testator is good on demurrer, though not directly alleging their appointment as such.

Bird v. Cotton, 57 Mo. 568.

⇐444 (3). Capacity in which suit is maintained.

Mo. 1871. In a suit by one administrator against another, plaintiff is required to aver affirmatively the fact that he sues in a representative character; and it is usual and proper that he should give the date of his letters of administration, and the court from which they were issued, that the defendant may be advised in regard to his authority, and be able intelligently to put it in issue. With regard to the representative character of defendant, the plaintiff is not supposed to know the particulars; and hence it is sufficient to aver in general terms that the defendant was executor or administrator of the particular estate sought to be charged.

Dodson v. Scroggs, 47 Mo. 285.

Mo. 1877. In a suit by an administrator de bonis non, the petition alleged that there had been two coadministrators of the estate and that the letters of one of them had been revoked, but it did not appear what became of the letters of the other administrator. *Held*, that the petition was insufficient, since no court has power to appoint an administrator de bonis non where there is an acting administrator.

State, to Use of Ranney, v. Green, 65 Mo. 528.

Mo. 1878. Failure to add the words "as administrator" after plaintiff's name in the caption of his petition was of no importance, where the petition expressly averred that he was duly appointed administrator and qualified as such.

State, to Use of Edwards, v. Bartlett, 68 Mo. 581.

Mo. 1883. A petition which alleges that a third person died in a designated county in the state; that plaintiff was thereafter duly appointed administrator of the estate of the decedent by the county court of that county, which court had probate jurisdiction in the county; that plaintiff accepted the appointment and qualified as administrator—sufficiently shows plaintiff's right to sue.

Eans' Adm'r v. Exchange Bank, 79 Mo. 182.

Mo.App. 1904. Where plaintiff sues as an administrator, and his pleadings are not amended to show that he prosecuted the suit in any other capacity, he must be treated as having sued in such capacity alone, and not as trustee of an express trust.

Sommer v. Franklin Bank, 83 S.W. 1025, 108 Mo.App. 490.

⇐445. —— Profert and oyer of letters.

For cases from other jurisdictions, see other Key Number Digests.

⇐446. —— Plea of plene administravit.

C.C.Mo. 1870. Where the statute classifies the debts against an estate, directs the order of payment, and makes the administrator liable only for assets received, the plea of plene administravit is no defense in an action against the administrator merely seeking to establish the existence of the plaintiff's claim against the estate.

Covington v. Burnes, Fed.Cas.No. 3,291, 1 Dill. 16.

⇐447. —— Demurrer.

Mo. 1835. In a suit in a county court to establish a demand against an administrator, no objection to the plaintiff's statement will be good, unless a general demurrer will lie.

Kearney v. Woodson, 4 Mo. 114.

Mo. 1875. A petition in a suit by a widow against the administrator of the deceased husband to recover the amount paid for taxes by her on the estate, which alleges that the administrator failed to pay the taxes on the

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real estate of the decedent for two years, that it was his duty to pay the taxes, having ample funds to do so, and that he suffered the lands to be returned as delinquent, and that plaintiff, having an interest in the estate, paid the taxes to prevent a sale for nonpayment, is sufficient as against a demurrer without showing that the collector of taxes had taken any other steps required by the statute to authorize him to collect them.

State, to Use of Moore, v. White, 61 Mo. 441.

⇐448. — Amendment.

For cases from other jurisdictions, see other Key Number Digests.

⇐449. — Issues, proof, and variance.

Mo. 1855. Where the allegation in the declaration was that the plaintiffs were administrators de bonis non of a deceased, and general letters, appearing, on the face of them, to be general letters of administration, were produced, and it was proved that there had been a previous administration, it was *held* that there was no fatal variance.

State, to Use of Moore, v. Price, 21 Mo. 434.

Mo. 1874. An administrator, though not bound to plead the general statute of limitation, in order to avail himself of it, must plead the statute specially applying to suits against him in his official capacity, and must allege the granting of his letters in the manner and within the time prescribed by law.

Stiles v. Smith, 55 Mo. 363.

It it well settled that an executor or administrator may avail himself, under the general issue, of a defense predicated upon the statute of limitations.

Stiles v. Smith, 55 Mo. 363.

Mo. 1936. In proceeding by alleged payee on note showing alterations of suspicious character demanding explanation before note was admissible in evidence where payee sought to recover upon note in its altered form, executors' plea of non est factum raised question of whether decedent executed instrument as sued on and payee had affirmative of such issue. Mo.St.Ann. § 966, p. 1239, V.A.M.S. §§ 509.100, 509.220, 509.240.

Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465.

Mo. 1942. In absence of evidence to show that contract fixing compensation for services rendered decedent by claimant had been modified, claimant could not recover from estate upon quantum meruit for services rendered.

Adams v. Othenin's Estate, 161 S.W.2d 415.

Mo. 1952. In action against administrator for reasonable value of services rendered to deceased, plaintiff was not required to plead or prove a specific promise on part of deceased to pay for the services, but was only required to plead and prove that at deceased's request, plaintiff rendered services, and that they were worth the amount asked.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1878. A bill against an executrix to set aside a sale of property which belonged to the decedent, and which alleged that there came into the hands of the executrix assets more than sufficient to pay the debts of the estate, and that she federated with her daughter to purchase notes secured upon the property sold with money belonging to the estate, in pursuance of which federation they caused the property to be advertised under the deed of trust and sold, did not raise the question as to whether or not rents of the realty which the executrix had received as her own, with the acquiescence of all the distributees and their attorneys, were assets in her hands which should have been applied to the payment of the debts of the estate.

Payne v. Payne, 5 Mo.App. 188.

Mo.App. 1882. One suing as an administrator must prove that he is such.

Gilmore v. Morris, 13 Mo.App. 114.

Mo.App. 1901. It is not essential that, in a case in a justice's court where the action may be maintained by plaintiff in an individual capacity, he should prove his representative capacity merely for the reason that he has brought the action as executor.

Knoche v. Perry, 90 Mo.App. 483.

Mo.App. 1906. In an action by an administrator for the conversion of property belonging to his decedent, failure to prove an allegation that decedent left a will was not fatal, since plaintiff did not derive his title from the will.

Grant v. Hathaway, 96 S.W. 417, 118 Mo. App. 604.

Mo.App. 1937. Plaintiff suing for services rendered deceased could recover on theory of implied contract and on quantum meruit, notwithstanding that plaintiff pleaded express contract, where plaintiff's demand set out reasonable value of services and alleged that they were rendered at special instance and request of deceased.

Murphy v. Pfeifer, 105 S.W.2d 39.

Plaintiff, whose demand set out reasonable value of services rendered deceased and alleged that services were rendered at special instance and request of deceased, could

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recover reasonable value of services without proving express contract, since proof of rendition of services would raise implied promise on part of deceased to pay reasonable value of services.

Murphy v. Pfeifer, 105 S.W.2d 39.

Mo.App. 1939. In action against administratrix individually for conversion of diamond rings, defense of gift which did not affect truth of matter set up in petition was not available where not pleaded. Mo.St.Ann. § 776, p. 1015, V.A.M.S. §§ 509.080, 509.090, 509.400, 509.420.

Manley v. Ryan, 126 S.W.2d 909, 235 Mo.App. 45.

Mo.App. 1940. Where plaintiff alleged, by way of inducement, that services were performed by her at special request of deceased in consideration of his promise to compensate her by bequest, but plaintiff merely sought recovery of reasonable value of her services, the action was in quantum meruit and not on an express contract, and failure to prove express contract was not fatal to recovery.

Balsano v. Madden, 138 S.W.2d 660.

Mo.App. 1949. In action by holder in due course of checks against administrator of alleged drawer to recover amount of checks after drawee bank refused payment thereof at direction of alleged drawer, wherein administrator denied indorsement of checks to holder in due course by the named payee, holder in due course was required to prove the making of the checks, indorsement, and delivery to him.

Pearce v. Hindman, 217 S.W.2d 592.

⇐450. Evidence.

Administratrix of estate of deceased annuitant, who sought to have annuity contracts rescinded because of alleged wrongful and fraudulent acts of agent of insurers which sold the annuity contracts, had burden of proving every element necessary to constitute actionable fraud.

C.C.A.Mo. 1939. Hinshaw v. New England Mut. Life Ins. Co., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488.

C.C.A.Mo. 1939. Hinshaw v. Massachusetts Mut. Life Ins. Co., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488.

Mo. 1835. Under Rev.Code, p. 627, providing that an instrument sued on is admissible without proof of its execution, unless the party charged to have executed the same denies the execution thereof by a plea, verified by affidavit accompanying such plea, in an action against an administrator a bond executed by his intestate is admissible, unless the execution thereof is denied by the administrator by such a plea.

Foster v. Nowlin, 4 Mo. 18.

The possession of letters of administration by the person to whom they purport to be granted is prima facie evidence of delivery.

Mo. 1842. McNair v. Dodge, 7 Mo. 404.

Mo. 1842. Hensley v. Dodge, 7 Mo. 479.

Mo. 1851. In an action against an administrator de bonis non, the onus is upon the plaintiff to show the amount of assets that went into his hands and his failure to account for them.

State, to Use of Taylor, v. Collier, 15 Mo. 293.

Mo. 1853. In a suit by a public administrator, the defendant cannot require him to show that the facts exist which authorize him to administer.

Wetzell v. Waters, 18 Mo. 396.

Mo. 1855. In an action by an administrator in his own name, in this state, on a judgment recovered in the state where he was appointed in his representative capacity, it will, in the absence of proof, be presumed that the courts of that state exercised lawful jurisdiction.

Hall v. Harrison, 21 Mo. 227, 64 Am.Dec. 225.

Mo. 1865. Under Rev.Code 1865, p. 13, § 7, providing for the recovery of goods of a deceased person which had been embezzled, the presumption is that, if defendant had possession of them at a time subsequent to the death of the owner, he is still in possession.

Howell v. Howell, 37 Mo. 124.

Mo. 1871. Proof of the existence, merely, of a debt which might have been applied as a set-off to a demand against the estate of a deceased person, does not raise a presumption that the debt was so applied, when neither the minutes of the probate court, nor the account presented and allowed against the estate, shows anything in relation to the set-off, though the claimant, on presenting his claim, filed the affidavit, prescribed by statute, that he had allowed all just credits against the claim.

Sweet v. Maupin, 47 Mo. 323.

Mo. 1876. Where, in an action by an administrator, defendant placed the administrator on the stand, and, after receiving an affirmative response to a question as to whether he was the administrator, asked him concerning the business of the estate, plaintiff was excused from proving his appointment, especially where defendant in his an-

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swer admitted the appointment, though he denied its legality.

Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

Mo. 1880. In a suit to establish a claim against the estate of a decedent, it was not error to refuse plaintiff leave to show as original evidence that deceased was a man of careless business habits, slow to pay, loath to settle.

Goddard v. Williamson's Adm'r, 72 Mo. 131.

Mo. 1881. On an issue as to whether a public administrator had been guilty of negligence in keeping a sum of money in his house in a bureau drawer, evidence was not admissible as to in what way or place others in the vicinity kept their money, unless it were shown that they were careful and prudent persons, or that it was the uniform custom of the community to keep money in such places.

Greenwell v. Crow, 73 Mo. 638.

Mo. 1895. In an action in the probate court by a wife against her husband's estate to enforce an antenuptial agreement, whereby the husband agreed to secure to her "all her estate except * * * such parts as shall have been consumed or destroyed," plaintiff is not required to show that no part of her estate was consumed or destroyed.

Hoffmann v. Hoffmann's Ex'r, 29 S.W. 603, 126 Mo. 486.

Mo. 1908. Evidence, in an action by distributees against an administrator for devastavit in selling certain stock belonging to the estate at private sale without an order of the probate court, examined, and *held* to sustain a finding that the sale was made under the direction of two of the plaintiffs.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1910. In a suit by residuary legatees to set aside a deed made by the executor and a deed for the grantee reconveying the premises to the executor individually, evidence *held* to justify a finding that the deeds were executed in fraud of the legatees.

Barnard v. Keathley, 130 S.W. 306, 230 Mo. 209.

Mo. 1911. In an action to set aside a settlement made by an executrix with grain brokers, with whom decedent had an account, evidence *held* insufficient to show that defendants had fraudulently concealed the extent of decedent's interest in certain speculative deals.

Troll v. Spencer, 141 S.W. 855, 238 Mo. 81, Ann.Cas.1913A, 276.

Mo. 1939. In proceeding on claim of corporation against estate of deceased general manager of the corporation, for money loaned to the manager, the executrix of manager's estate had burden of proving by a preponderance of evidence, counterclaim based on alleged failure of corporation to pay increased sum to manager upon increase of corporation's business, as provided by contract between corporation and manager.

Peoples Finance Corporation v. Buckner, 126 S.W.2d 301, 344 Mo. 347.

Mo. 1948. In suit to set aside deed conveying a farm but reserving a life estate to grantor as in fraud of creditor brought after grantor's death, evidence justified decree for grantees on the ground that the deed was made for an adequate consideration and that the conveyance was not made with actual intent to defraud the creditor.

Chrisman v. Zeysing, 209 S.W.2d 144.

Mo.App. 1888. Under Rev.St. § 548, V.A.M.S. § 401.212, providing that the payee of a note may sue the maker, the administrator of the payee of a note was prima facie the owner of it, and in an action on it by him in his representative capacity the burden was on defendant to show any lack of title in plaintiff.

Bobb v. Letcher, 30 Mo.App. 43.

Mo.App. 1889. In an action on a note by the administrator of the payee, the defense of failure of consideration should not be countenanced, unless sustained by the clearest and most convincing proof.

Woodson v. Ritchie, 36 Mo.App. 506.

Mo.App. 1890. An administrator, having recovered a judgment against an heir on a note of the heir held by the intestate, sued the assignee of the heir's distributive share to have such share applied in payment of the debt. *Held* that, as the plaintiff's standing in a court of equity as against defendant depended on the fact that the claim had been liquidated by judgment, the judgment was admissible for the purpose of showing the liquidation.

Ford v. O'Donnell, 40 Mo.App. 51.

Mo.App. 1892. Plaintiffs' capacity as executor of their decedent was sufficiently shown by the introduction in evidence of several answers filed by defendant in actions between the same parties containing admissions that plaintiffs were such executors.

Fry v. Estes, 52 Mo.App. 1.

Mo.App. 1894. Evidence of declarations of a decedent that money for which suit was brought against her estate belonged to plaintiff is sufficient to establish a prima facie case.

Diel v. Stegner, 56 Mo.App. 535.

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Mo.App. 1895. The action of the trial court in permitting plaintiff in an action against an estate for services rendered to swear to her claim before the jury was not reversible error.

Ronsiek v. Boverschmidt's Adm'r, 63 Mo. App. 421.

In an action against an estate by a daughter of decedent for services rendered, the evidence examined, and *held* sufficient to justify the submission to the jury whether there was an agreement to pay plaintiff.

Ronsiek v. Boverschmidt's Adm'r, 63 Mo. App. 421.

Mo.App. 1910. In a suit by an administrator to recover money borrowed from deceased, after showing the original loan, plaintiff is not bound to show that the debt had not been discharged.

Hoss v. Crawford, 129 S.W. 1053, 145 Mo. App. 360.

In a suit by an administrator to recover money borrowed from deceased, evidence *held* sufficient to take the issue as to the indebtedness to the jury.

Hoss v. Crawford, 129 S.W. 1053, 145 Mo. App. 360.

Mo.App. 1910. In an action by a wife's administrator against the husband's executor to recover the proceeds of purchase-money notes payable to the husband and wife and given for land purchased in the husband's name with the wife's money, evidence *held* to sustain a finding that they agreed that the survivor of them should have the interest on the note until his death, when it or its proceeds should go to the wife's daughter.

Ryan v. Ford, 132 S.W. 610, 151 Mo.App. 689.

Mo.App. 1911. Refusal to admit in action on claim against decedent's estate, pleadings in suit to set aside first allowance of claim by probate court, decree in which suit was in evidence, was not error.

Renfrew v. Goodfellow, 141 S.W. 1153, 162 Mo.App. 333.

Mo.App. 1912. Evidence in an action by an administrator for money turned over by deceased to defendants *held* to authorize an inference by the jury that it was not intended by deceased or treated by defendants as absolute.

Campbell v. Hayden, 145 S.W. 103, 164 Mo.App. 252.

Mo.App. 1914. Evidence in an administrator's action to recover from defendants money alleged to have been turned over to them by the deceased, their uncle, in contemplation of services to be rendered, *held* sufficient to show an agreement between deceased and defendants whereby, in consideration of their undertaking to support him, he had given them the money involved.

Campbell v. Hayden, 168 S.W. 363, 181 Mo.App. 681.

In an action by an administrator to recover money alleged to have been turned over to defendants by deceased in contemplation of services to be rendered, the agreement may be inferred from circumstances, and, though there must be an actual agreement, it is not essential that it should have been put into words, although essential that there should have been a meeting of the minds of the parties.

Campbell v. Hayden, 168 S.W. 363, 181 Mo.App. 681.

Mo.App. 1918. In an action against administratrix and heirs for diverting from an estate decedent's interest in land under a contract, evidence *held* insufficient to show that decedent's interest was of any value.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

Mo.App. 1920. The burden is on an administratrix, suing to compel the payment, of a legacy to her intestate, to her, to prove both the death of her intestate and the fact that he survived testator.

In re Buck's Estate, 220 S.W. 716, 204 Mo.App. 1.

Mo.App. 1920. In action against the estate of a decedent on account of small loans over a considerable period of time, where action was barred long before the death of decedent, and part payment and admission of indebtedness were relied on, recovery must be limited to the amount admitted, although the jury should be required to ascertain the various amounts, and there can be no recovery on account of loans the amounts of which were not established.

Weir v. Carter's Estate, 224 S.W. 147.

Mo.App. 1922. An executrix suing on a note to testator is not required to show in the first instance how it came into her possession, though the defense is payment to deceased.

Reardon v. White, 239 S.W. 162.

Mo.App. 1926. Where administrator offered no proof to show when letters of administration were granted, nor when publication of notice began, nor when demand was exhibited to him, *held* proof of bar of claim by limitations was insufficient.

Oliver v. McFarland, 282 S.W. 735.

Mo.App. 1927. Trust deed *held* prima facie evidence of making of notes, correspond-

ing in dates, parties, and amount with those recited.

Courtney's Estate v. Lanznar's Estate, 296 S.W. 269.

⇐451. Trial.

⇐451 (1). In general.

Mo. 1835. In an action by an administrator, where, after the plaintiff had stated that his evidence was all in, the defendant moved for a nonsuit because the letters of administration had not been read, the plaintiff was allowed to read them, and the court refused the nonsuit.

Huston v. Becknell, 4 Mo. 39.

⇐451 (2). Questions for jury.

In an action against an administrator to recover money claimed to have been loaned defendant's intestate by his father-in-law to pay his expenses to another state to secure his wife's body and to pay her funeral expenses, whether it was understood that intestate should repay the money *held* a jury question.

Mo. 1914. Linderman v. Carmin, 164 S. W. 614, 255 Mo. 62.

Mo.App. 1910. Linderman v. Carmin, 127 S.W. 124, 142 Mo.App. 519.

Mo. 1903. Whether services rendered by a son and daughter-in-law in nursing parents, who lived in the same house, under a business arrangement whereunder the son paid rent for the farm, were intended as a gratuity, or under an implied contract for pay, is a question for the jury.

Lillard v. Wilson, 77 S.W. 74, 178 Mo. 145.

Mo. 1908. Whether an administrator acted with prudence and skill in selling personal assets of the estate at private sale is a question of fact for the jury.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1928. In action for services rendered deceased, whether deceased intended to pay and plaintiff expected to receive payment *held* for jury.

Wandling v. Broaddus, 10 S.W.2d 651.

Mo. 1934. Whether board and lodging and other services rendered to deceased, with whom there existed a family relation, for some 16 years were rendered with the understanding that claimants should be compensated therefor, *held* for jury.

Chandler v. Hulen, 71 S.W.2d 752, 335 Mo. 167.

Mo. 1942. In action against estate to recover on quantum meruit for services rendered decedent during his lifetime, where uncontroverted evidence sustained finding that plaintiff was paid amount called for in contract with decedent, trial court should have directed verdict for estate.

Adams v. Othenin's Estate, 161 S.W.2d 415.

Mo. 1942. In administratrix' action to recover attorney's fee for legal services rendered by her intestate from administrator of deceased client's estate, question whether plaintiff's intestate promised client to perform certain services without pay, witnesses' credibility, and persuasiveness of evidence on such question, were for jury.

Laughlin v. Boatmen's Nat. Bank of St. Louis, 163 S.W.2d 761.

In administratrix' action to recover attorney's fee for legal services rendered by her intestate from administrator of deceased client's estate, defendant's evidence *held* sufficient to take to jury question whether plaintiff's intestate served client with fidelity at all times, especially in defending insanity proceedings against him.

Laughlin v. Boatmen's Nat. Bank of St. Louis, 163 S.W.2d 761.

Mo. 1943. In action against administrator on decedent's check executed pursuant to alleged contract whereby plaintiff agreed to care for decedent's mother during her lifetime, existence of such a contract was for jury.

Baker v. Swearengin, 174 S.W.2d 823, 351 Mo. 1027, transferred 168 S.W.2d 473.

Mo.App. 1891. In an action against an administrator to recover money alleged to have been had and received by deceased, testimony of one witness that, eight or nine months prior to the death of deceased, he had a conversation with him, in which he admitted that he had a certain amount of money in his hands belonging to plaintiff, was sufficient evidence to justify submission of the issue to the jury.

Carder v. Primm, 47 Mo.App. 301.

Mo.App. 1905. In an action for services rendered in caring for and nursing decedent the question whether decedent was a member of plaintiff's family, being a question of mixed law and fact, was for the jury, under appropriate instructions.

Birch v. Birch, 86 S.W. 1106, 112 Mo.App. 157.

Mo.App. 1910. Evidence in a suit by a child to establish a claim against her deceased mother's estate for services rendered her *held* sufficient to require submission to the jury of the issue of a promise by the mother to pay therefor.

Cupp v. McCallister, 129 S.W. 435, 144 Mo.App. 111.

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Mo.App. 1911. In an action against a public administrator to recover for extra services performed for decedent, where it appeared that the decedent was in the home of the plaintiff as a boarder under an express contract to pay for board and room, and that she paid this in full, there is no presumption whether extra services rendered were to be paid for, but the question is for the jury.

Baxter v. Troll, 133 S.W. 1188, 152 Mo. App. 557.

Mo.App. 1916. In action for board, nursing, and services furnished plaintiff's deceased mother, evidence *held* to make question for jury as to whether there was an agreement to pay therefor.

Le Count v. Fountain's Estate, 182 S.W. 102.

Mo.App. 1919. In an action by deceased's stepdaughter to recover from deceased's administrator for services rendered, *held* that in view of the evidence it was not error to submit the question of express contract for services.

Shock v. Price, 207 S.W. 834.

Mo.App. 1919. In an action for services rendered a deceased person by one taken into decedent's family when a child, evidence *held* not to make a question for the jury as to whether decedent had promised to pay for the services rendered, or had intended to pay for them.

Nelson v. Poorman's Estate, 215 S.W. 753.

Mo.App. 1922. In an action for board and lodging furnished decedent in her lifetime, facts *held* not to conclusively show that decedent aunt was in plaintiff's home as a member of his family in the sense that she was such a part thereof that the board and lodging furnished her were gratuities accorded her; the question being for the jury.

Hudson v. Hall, 239 S.W. 152.

Mo.App. 1922. In daughter's action against mother's estate for boarding, clothing, caring for, and supporting mother, whether the mother agreed to pay the daughter therefor *held* for the jury.

Bunton v. Newell, 239 S.W. 1096.

Mo.App. 1922. In an action by a member of a family against the estate of a deceased person to recover for services rendered, evidence *held* sufficient to take to the jury the issue as to whether or not there was a mutual understanding or agreement that the services in question were not voluntary, but that compensation was to be made therefor.

Baker v. Lyell, 242 S.W. 703, 210 Mo.App. 230.

Mo.App. 1924. In an action for services rendered for keeping house for defendant's intestate, who was not a relative of the plaintiff, evidence *held* to raise a jury question as to intestate's agreement to compensate plaintiff.

Stice v. Sims, 257 S.W. 818.

Mo.App. 1924. If at the time claimant furnished board and lodging to deceased he had no intention of charging for them, he cannot afterwards decide to do so and recover; his intention under the facts being for jury.

Brunnert v. Boeckmann's Estate, 258 S. W. 768.

Mo.App. 1924. Evidence that one performing personal services, such as nursing, washing, etc., for the surviving husband of her deceased aunt expected, and that he intended, that she should be paid therefor, *held* sufficient for the jury.

Shern v. Sims, 258 S.W. 1029.

Mo.App. 1924. In a suit against an estate for services rendered by a girl taken into decedent's home in working, nursing, and caring for him during his lifetime, testimony as to decedent's statements of his intention to pay her, and her expectation of payment, *held* sufficiently substantial to require submission of the case to the jury.

Smith v. Sims, 258 S.W. 1032.

Mo.App. 1924. Evidence that there was implied agreement that decedent expected to pay for work and labor performed in caring for her *held* for jury; "implied" meaning that contract could be inferred from evidence.

Wandling v. Broaddus, 265 S.W. 1003.

Mo.App. 1925. Evidence *held* to make a prima facie case for plaintiff, so that demurrer thereto properly overruled.

Miller v. Smith, 275 S.W. 769.

Demurrer at close of evidence properly overruled, where plaintiff's evidence sufficient to take case to jury.

Miller v. Smith, 275 S.W. 769.

Mo.App. 1925. Whether plaintiffs furnishing decedent personal services had no intention to charge therefor *held* for court sitting as jury.

Brunnert v. Boeckmann's Estate, 276 S. W. 89.

Mo.App. 1926. In action against administrator on lost note of deceased, where plaintiff's proof was oral, peremptory instruction for plaintiff was error.

Oliver v. McFarland, 282 S.W. 735.

Mo.App. 1926. Evidence *held* to make question for jury whether understanding that personal services were to be compensated existed between wife and husband's brother.
Smarr v. Smarr's Estate, 283 S.W. 461.

Evidence, in action for services rendered *held* for jury.
Mo.App. 1927. Lauf v. Wiegersen, 297 S.W. 79.
Mo.App. 1928. La Rue v. Ogden, 2 S.W. 2d 203.

Mo.App. 1927. Evidence *held* to make issue for jury as to claimant's right to compensation for services rendered deceased bachelor in performing household duties on ranch.
Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Mo.App. 1927. Existence of contract to reimburse husband and wife caring for deceased for loss of husband's salary, as well as to pay for care, *held* jury question in action against estate.
Guthrie v. Fields, 299 S.W. 141.

Mo.App. 1928. Whether plaintiff suing on quantum meruit after decedent's breach of contract to devise half of her estate for services was entitled to half of estate *held* for jury.
Blackwell v. De Arment's Estate, 300 S.W. 1035.

Mo.App. 1928. Whether defendant signed guaranty in representative capacity without intent to be liable thereon *held* for jury.
International Store Co. v. Barnes, 3 S. W.2d 1039.

Mo.App. 1929. Evidence, supporting claim against estate of deceased, for work performed while plaintiff lived with deceased, *held* sufficient to take claim to jury.
Broyles v. Byrne, 13 S.W.2d 560.

Mo.App. 1929. Evidence in action to recover for board and services performed for deceased required submission to jury.
Lauf v. Wiegersen, 17 S.W.2d 369.

Whether services were rendered deceased during lifetime with intention of charging therefor *held* for jury.
Lauf v. Wiegersen, 17 S.W.2d 369.

Mo.App. 1929. Evidence of plaintiff's purchase of notes from intestate's firm with agreement of firm to repurchase on notice *held* sufficient for jury.
Arnest v. Messerly, 17 S.W.2d 670.

Mo.App. 1930. Testimony witnesses had seen plaintiff attorney in conference with deceased was insufficient evidence to go to jury on plaintiff's claim against executors for legal services.
Norton v. Lynds, 24 S.W.2d 183.

Mo.App. 1931. Whether deceased had entered into contract to pay plaintiff for services rendered to deceased during her lifetime *held* for jury.
Thayer v. Palen, 34 S.W.2d 536, 224 Mo. App. 1088.

Mo.App. 1932. Evidence *held* sufficient to take to jury question of decedent's sister's right to payment for services in caring for deceased after he became physically incapacitated.
Roller v. Montgomery's Estate, 45 S.W. 2d 945.

Evidence *held* insufficient to take to jury question whether one filing claim against her deceased brother's estate was to receive pay for services rendered before he became physically incapacitated.
Roller v. Montgomery's Estate, 45 S.W.2d 945.

Mo.App. 1934. In suit for services rendered daughter of deceased under contract between deceased and plaintiff, evidence that contract was between deceased and plaintiff and plaintiff's husband *held* insufficient to authorize directed verdict for defendant.
Helsley v. Ferguson, 67 S.W.2d 103, 228 Mo.App. 386.

Mo.App. 1934. In action by orphan boy against estate for farm services rendered deceased with whom he had made home, evidence that both boy and deceased had intended that boy should be compensated, and that services rendered were valuable *held* sufficient to take case to jury.
Gamblin v. Wells' Estate, 75 S.W.2d 862.

In action by orphan boy against estate for farm services rendered deceased with whom he had made home where issue was whether intention had been that boy should be compensated, evidence of statements by boy that he had no claim against estate *held* for jury, in view of evidence that deceased's son had promised boy home if he did not file claim.
Gamblin v. Wells' Estate, 75 S.W.2d 862.

Mo.App. 1935. In proceeding against administrator for services rendered crippled decedent by neighbor for 11 years, evidence that deceased requested some, and received benefit of and permitted all, of the services to be rendered, and that services were reasonably worth $1 per day, *held* to make case for jury, regardless of whether deceased intended to pay.
O'Shaughnessy v. Brownlee, 77 S.W.2d 867, 229 Mo.App. 342.

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Evidence showing that claimant, for 11 years immediately preceding death of decedent, rendered services to decedent which were reasonably worth $1 per day *held* sufficiently definite for jury on question of reasonable value.

O'Shaughnessy v. Brownlee, 77 S.W.2d 867, 229 Mo.App. 342.

In proceeding on claim for services rendered to crippled decedent by neighbor, whether there was implied promise on part of decedent to pay for the services *held* for jury under evidence.

O'Shaughnessy v. Brownlee, 77 S.W.2d 867, 229 Mo.App. 342.

Mo.App. 1935. Evidence *held* sufficient to take to jury question of right of decedent's sister to payment for services in caring for decedent after he became physically incapacitated.

Roller v. Montgomery's Estate, 80 S.W.2d 246.

Mo.App. 1935. In action by sister and her husband for services rendered deceased brother, whether agreement or intention existed that services should be paid for *held* for jury.

Whistler v. Bond, 87 S.W.2d 237.

In action by sister and her husband for services rendered deceased brother who was taken to her home to be cared for during last two and a half or more years of his life, court was not required as matter of law to declare that family relation existed between sister and her husband and deceased brother, particularly where deceased brother's executor voluntarily submitted issue to jury.

Whistler v. Bond, 87 S.W.2d 237.

Mo.App. 1939. In action by executrix against maker on note payable to bank and indorsed in blank by bank cashier, evidence that note was not an asset of decedent during his lifetime but was found among papers of his estate after death of bank cashier, who was also administrator pendente lite of decedent's estate, was for jury on issue of executrix' right of possession and ownership.

Wolf v. Wuelling, 130 S.W.2d 671, 233 Mo.App. 1144.

Mo.App. 1940. In action on claim against estate based on contract whereby deceased agreed to pay plaintiff $1,000 if he and his wife would move into home of deceased and take care of him, evidence regarding existence and performance of contract was sufficient for jury.

Heathcock v. Wolfe, 136 S.W.2d 105.

Mo.App. 1940. In action in quantum meruit for reasonable value of services rendered at special request of deceased, under evidence showing that services were performed, that they were not intended to be gratuitous, what their reasonable value was, and that plaintiff had received no payment from deceased, request of deceased's administrator for peremptory instruction at close of all evidence was properly denied.

Balsano v. Madden, 138 S.W.2d 660.

Mo.App. 1943. Where evidence clearly established contract whereby deceased agreed to pay plaintiff $800 for caring for deceased's mother and it was not disputed that deceased acknowledged amount due court properly directed verdict for plaintiff.

Baker v. Swearengin, 168 S.W.2d 473, transferred 174 S.W.2d 823, 351 Mo. 1027.

Mo.App. 1943. Whether nephew performed services for his great uncle during great uncle's life under agreement or mutual understanding or intention that services should be paid for, was for jury in action against great uncle's administrator to recover for services.

Runnels v. Allen, 170 S.W.2d 144.

Mo.App. 1943. Evidence, including showing that claimant for thirteen years occupied a platonic relationship with decedent for their mutual convenience, that home was sometimes rented by claimant and sometimes by decedent, that claimant did the ordinary household work while decedent paid the expenses, established a "family relation" between decedent and claimant, and hence was insufficient for jury as to existence of contract for payment of services.

Manning v. Driscoll's Estate, 174 S.W.2d 921.

Mo.App. 1944. In action against executor for nursing services rendered decedent, instruction in nature of demurrer to plaintiff's evidence on ground that action was based on express contract not proved was properly refused, since plaintiff's claim was based on quantum meruit.

In re Stein's Estate, 177 S.W.2d 678.

In husband's action against executor for nursing services rendered decedent, wherein wife testified on husband's behalf, instruction in nature of demurrer to husband's evidence on ground that joint contract with decedent for services of both husband and wife was made, so that neither could testify, was properly refused, since evidence showed contracts were several.

In re Stein's Estate, 177 S.W.2d 678.

In action against executor, instruction in nature of demurrer to evidence because of absence of evidence showing condition

For references to other topics, see Descriptive-Word Index

of estate as to assets or claims and that time for filing claims had not expired, was properly refused where such matters were not issues in the case.

In re Stein's Estate, 177 S.W.2d 678.

Mo.App. 1945. The weight and credibility of evidence as to decedent's statements that he had made will devising his estate to two boys, with oral understanding that they would divide with their father, and contents of will as bearing out such statements, were for jury in father's proceeding to recover compensation for services rendered to decedent.

Runnels v. Allen's Estate, 184 S.W.2d 740.

Mo.App. 1945. In action by deceased's niece to recover from deceased's estate the value of services rendered to deceased during his lifetime, evidence as to services rendered and as to expectation and promise of payment was for jury.

Offord v. Jenner's Estate, 189 S.W.2d 173.

Mo.App. 1947. Evidence, including testimony of decedent's nephew, who was executor and chief beneficiary under will, did not establish as matter of law that plaintiff was not entitled to recover under implied contract for reasonable value of personal services performed for decedent during his lifetime, but at most presented question for jury.

Evans v. Wall, 199 S.W.2d 908.

Mo.App. 1950. In action by son against executor of father's estate to recover sums expended by son on behalf of father during his lifetime, evidence of an express or implied contract for repayment was sufficient for jury.

Geisendorfer v. Geisendorfer, 227 S.W. 2d 470.

⇐451(3). Instructions.

Mo. 1899. Where decedent's cousin sued his estate on a quantum meruit for services rendered as housekeeper, to which defendant pleaded a general denial, and also an express contract, and admitted that plaintiff rendered such services, but denied the debt, and averred that the services were performed as a member of decedent's family, and were gratuitous, instructions that, where services are rendered, an obligation to pay therefor will be presumed, but that a presumption may arise from the relationship of the parties that the services were gratuitous, and that it was a question for the jury to determine whether there was an implied agreement for compensation, and, if it was understood between the parties that plaintiff should receive pay for the services, she was entitled to recover on a quantum meruit such sum as her services were reasonably worth, not exceeding a certain sum per annum, were not erroneous, as not warranted by the pleadings.

Sprague v. Sea, 53 S.W. 1074, 152 Mo. 327.

Mo. 1924. In proceedings against an estate for allowance of claim for reasonable value of services rendered testator, in which there was no evidence of an express contract to pay claimant, an instruction predicated on an express agreement to pay a certain sum for services was erroneous.

Hodge v. St. Louis Union Trust Co., 261 S.W. 67.

Mo. 1926. Instructions, in action for compensation for services rendered to decedent, *held* to state law applicable to case correctly.

Brown v. Holman, 286 S.W. 36, 315 Mo. 478.

Mo. 1928. In action for services rendered deceased, instruction *held* not erroneous as not requiring finding that parties intended plaintiff should be paid.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, instruction not requiring jury to find services were not paid for *held* not erroneous, absent plea and proof of payment.

Wandling v. Broaddus, 10 S.W.2d 651.

In action for services rendered deceased, instruction requiring jury to find it was understood plaintiff should be paid *held* not erroneous as not requiring jury to find whether services were voluntary.

Wandling v. Broaddus, 10 S.W.2d 651.

Mo. 1936. In proceeding to establish note as demand against decedent's estate, where note showed alterations on its face and payee's theory was that alterations changing note from partnership to personal obligation were made after note left decedent's possession, but change was assented thereto by decedent, instructions authorizing finding that no material alteration was made in note *held* erroneous.

Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465.

Mo. 1942. In administratrix' action to recover attorney's fee for legal services rendered by her intestate from administrator of deceased client's estate, court erred in refusing instruction that plaintiff was not entitled to recover, if jury found that her in-

testate did not represent client's interest with undivided fidelity at all times.

Laughlin v. Boatmen's Nat. Bank of St. Louis, 163 S.W.2d 761.

Mo. 1952. In action on quantum meruit for services rendered to deceased, instruction permitting recovery for services rendered from "about May 1931, to April 13, 1948," and limiting recovery to $18,564, though evidence showed that services began May 16, 1931, was indefinite and was improper, in view of fact that it allowed $33.00 more than evidence showed could possibly have been due at claimed $3 daily rate, but the harmful effects if any, of such instruction could be cured by requiring remittitur.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1902. In an action by plaintiff to recover for services rendered his deceased brother-in-law during his lifetime, where the evidence as to an agreement on the part of the deceased to pay for the services was conflicting, it was error to charge that plaintiff was entitled to recover for all services rendered decedent, whether rendered by him himself or by his wife.

Moore v. Renick, 68 S.W. 936, 95 Mo.App. 202.

Mo.App. 1903. An instruction, in an action by a decedent's daughter to recover from his estate for services, that if plaintiff continued to reside with her parents after attaining her majority, and did work as before, the presumption is that the services were gratuitous, and that the burden was on her to rebut this presumption, is not in conflict with another instruction that ordinarily a contract to pay for services would be presumed, but that a presumption might arise, under certain circumstances, that the services were gratuitous, and that in this case it was a question for the jury, taking into consideration the circumstances and the relationship of the parties, to determine if there was an implied contract between the parties.

Shannon v. Carter, 72 S.W. 495, 99 Mo. App. 134.

Mo.App. 1906. In proceedings to establish a claim for services against decedent's estate, an instruction that if the jury should find that plaintiff rendered any services for decedent, for which he knowingly received the benefit, the jury should take such services into consideration in making up their verdict, was not objectionable as excluding an implied contract, as it limited plaintiff's right to recover to such contract.

Hammer v. Crawford, 93 S.W. 348.

Mo.App. 1913. In action against administrator of plaintiff's stepfather for services rendered the father, evidence *held* not to justify an instruction that if the stepfather rendered valuable services in an amount equal to those rendered by plaintiff, and as a remuneration therefor, plaintiff would not be entitled to recover.

Kingston v. Roberts, 157 S.W. 1042, 175 Mo.App. 69.

Mo.App. 1913. In an action upon a claim for services rendered by a granddaughter in taking care of decedent, an instruction *held* erroneous as implying a promise to pay for the services, where the relation of the parties was such that no promise was implied, even though they were not members of the same family.

Hyde v. Honiter, 158 S.W. 83, 175 Mo. App. 583.

Mo.App. 1916. In suit against estate for services, though defendant did not plead payment, *held* that instruction should have directed deduction from value of services of amount which will directed to be paid for such services.

Le Count v. Fountain's Estate, 182 S.W. 102.

Mo.App. 1919. In a suit against estate for services rendered to the decedent an instruction purporting to cover the whole case and directing a verdict for plaintiff, without limiting the evidence to be considered by jury to the kind and character of services, if any, during the period set out in the claim, was reversible error.

Kleinberg v. Kinealy, 207 S.W. 237.

Mo.App. 1919. An instruction that, if the services furnished deceased by plaintiffs were rendered with the expectation on the part of plaintiffs that they were to receive payment therefor, and the expectation on the part of deceased that she was to make compensation therefor, such mutual expectation constituted a sufficient contract *held* sufficient to require a finding that each party knew of the other's intention, since the word "expectation" implies an agreement.

Shock v. Price, 207 S.W. 834.

In an action by a stepdaughter for services rendered deceased, an instruction that services rendered by one relative to another are presumed gratuitous, and that plaintiff must overcome this presumption, and prove an agreement for compensation existing when services were rendered, *held* correct.

Shock v. Price, 207 S.W. 834.

Mo.App. 1920. On the trial of a claim against a decedent's estate for money turned over to her by her granddaughter with the

understanding that she was to account for any balance not needed for the granddaughter's support, an instruction permitting the jury to take into account moneys intrusted to the decedent after the granddaughter attained her majority was erroneous, as that cause of action arose out of the trust relation, the settlement of which was for a court of equity.

Stetina v. Bergstein, 221 S.W. 420, 204 Mo.App. 366, record of court of appeals quashed State ex rel. Stetina v. Reynolds, 227 S.W. 47.

Mo.App. 1922. In an action for board and lodging furnished decedent during her lifetime, in view of the evidence that decedent had evidence from which it could be found that decedent promised to pay, and it was not error to instruct as to the relationship and as to decedent's promise and plaintiff's expectation of payment.

Hudson v. Hall, 239 S.W. 152.

Mo.App. 1922. In an action against an executor for board and room furnished deceased, an instruction was not erroneous for not specifying the precise dates for which board was claimed, where no board was claimed except for the first nine months in which deceased occupied the room, and there was nothing to raise an inference the jury allowed more than was claimed for board.

Smith v. Collins, 243 S.W. 219.

In an action against an executor for rent of a room furnished deceased, an instruction which failed to take into account the occupancy of the room by deceased's wife with deceased for part of the time was not erroneous where no claim was made for additional rent because of the wife's occupation of the room.

Smith v. Collins, 243 S.W. 219.

In an action against an executor for board and room furnished deceased, an instruction that, if deceased had the room for his use at all times, and plaintiff always kept it ready for his use, the fact that he did not occupy or make use of the room at all times should not prevent a recovery, *held* not erroneous as referring to an express contract.

Smith v. Collins, 243 S.W. 219.

In an action against an executor for board and room furnished deceased, an instruction that, if deceased expected to pay and plaintiff expected to receive pay for the board and room, such mutual expectations constituted an agreement, and it was not necessary to establish the contract by direct testimony, but that the same might be established by proof of facts and circumstances, was not erroneous.

Smith v. Collins, 243 S.W. 219.

In an action against an executor for board and room furnished deceased, an instruction that a statement by deceased that he expected to remember or take care of plaintiff in his will was not sufficient to entitle plaintiff to recover was properly refused as being misleading and likely to be misunderstood.

Smith v. Collins, 243 S.W. 219.

Mo.App. 1924. Instruction authorizing verdict against estate for what plaintiff's services to decedent were reasonably worth up to aggregate amount claimed, which jury awarded, though services were charged for in pleading at $1.50 per day and evidence showed that plaintiff did not work for decedent every day nor hold herself subject to call, *held* erroneous as not requiring finding as to amount of time worked.

Carroll v. Young, 267 S.W. 436.

That plaintiff, who was not member of deceased's family, or household, was his daughter-in-law only, is insufficient to rebut presumption of liability to pay for services rendered to him; but where there is evidence that she lived in his home when services were begun, and no showing as to how long she lived there nor that she was expressly requested to perform services, instruction should fully and plainly set forth all necessary elements of implied contract.

Carroll v. Young, 267 S.W. 436.

Mo.App. 1925. Instruction that, if claim for services rendered decedent was fraudulent and knowingly false, jury could reject any or all of it, should have been given.

Feurt v. Lotspeich, 273 S.W. 240, 221 Mo. App. 355.

Mo.App. 1926. In suit for personal services, instruction to consider what from evidence is reasonable sum for services will not be held erroneous in failing to confine jury to services alleged in demand, in absence of showing that evidence was not confined thereto. V.A.M.S. § 481.130.

Smarr v. Smarr's Estate, 283 S.W. 461.

In suit for personal services by wife against estate of husband's deceased brother, refusing instruction that, after death of husband, husband's brother and wife became partners is not error, in absence of defendant's indicating bearing on service.

Smarr v. Smarr's Estate, 283 S.W. 461.

Mo.App. 1927. Evidence *held* to warrant instruction submitting question whether decedent requested claimant to perform services.

Wharton v. Denny, 296 S.W. 183, 222 Mo.App. 260.

For later cases see same Topic and Key Number in Pocket Parts

Instruction that law presumes intent to charge and pay for services *held* not error, in absence of family or other close relation.

Wharton v. Denny, 296 S.W. 183, 222 Mo.App. 260.

Mo.App. 1927. Instruction, in action against administrator, for services rendered deceased, failing to submit issue of family relation, *held* erroneous under evidence.

Lauf v. Wiegersen, 297 S.W. 79.

Mo.App. 1927. Refusal of instruction that deceased's statements of intention to give claimant property did not warrant recovery under claim, unless claimant intended to charge for services rendered, *held* error.

Thomas v. Fitzgerald's Estate, 297 S.W. 425.

Mo.App. 1927. Instruction permitting jury to find for claimants against estate *held* not objectionable as permitting finding of unreasonable compensation.

Guthrie v. Fields, 299 S.W. 141.

Mo.App. 1928. In claim for services rendered at decedent's request, instruction *held* to have properly submitted issue of express contract as alleged in claim.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, which conformed to 15 S.W.2d 1116.

In claim for services, instruction *held* not erroneous as assuming point in issue that plaintiff intended to charge and deceased to pay.

Dean v. Dean, 1 S.W.2d 235, opinion quashed State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, which conformed to 15 S.W.2d 1116.

Mo.App. 1928. Evidence *held* not to warrant instruction that fiduciary relationship raising presumption of undue influence, existed between plaintiff and decedent where latter executed note for services rendered.

La Rue v. Ogden, 2 S.W.2d 203.

Mo.App. 1929. Instruction requiring intention to charge deceased for services with agreement to pay reasonable worth was not broader than pleading consisting of informal demand.

Lauf v. Wiegersen, 21 S.W.2d 635.

Mo.App. 1930. In action by attorney for services, it was proper to inform jury plaintiff merely assisted city counselor in prosecution.

Norton v. Lynds, 24 S.W.2d 183.

Mo.App. 1933. Instruction *held* not erroneous as permitting conclusion that jury would be authorized to allow claimant pay for services rendered deceased father not only by herself but by other members of her family.

Love v. Richardson, 61 S.W.2d 220.

In daughter's action for services rendered deceased, refusal to instruct that claimant could not recover for use of home of claimant's husband, and that only services for which she could recover, if any, were nursing and caring for father night and day, *held* not error.

Love v. Richardson, 61 S.W.2d 220.

Refusing instruction that claimant could not recover for services rendered to her deceased father by any members of her family *held* not error.

Love v. Richardson, 61 S.W.2d 220.

Refusing instruction that claimant could not recover for services rendered to her deceased father by her husband nor for any food furnished by her husband *held* not error.

Love v. Richardson, 61 S.W.2d 220.

Mo.App. 1935. Where claimant and deceased had long been intimate friends, and claimant relied upon deceased's implied promise to pay him for services rendered deceased, instruction that if services were rendered voluntarily with no intention to charge or to pay therefor, or if circumstances were such that reasonable person would have believed that no compensation was expected, verdict should be for estate, *held* proper.

Taylor v. Currie's Estate, 83 S.W.2d 194.

Mo.App. 1935. Instruction that sister and her husband could recover for services rendered deceased brother if sister and husband intended to charge for services when they were made, and if deceased brother intended services should be paid for, *held* not erroneous as permitting recovery if sister and husband intended to charge for services whether or not deceased brother was aware of such intention, or mutual understanding existed that services should be paid for.

Whistler v. Bond, 87 S.W.2d 237.

Mo.App. 1937. Instruction permitting recovery for services rendered in behalf of deceased both before and after death, without proof that specific compensation was agreed upon, *held* not error.

Murphy v. Pfeifer, 105 S.W.2d 39.

Mo.App. 1939. In action by executrix against makers upon note payable to bank and indorsed in blank by bank cashier, who before his death was also administrator pendente lite of the estate, instruction that jury should find for makers, if they found that cashier attempted to act both as cashier

of the bank and as administrator of the estate in the transaction, was erroneous.

Wolf v. Wuelling, 130 S.W.2d 671, 233 Mo.App. 1144.

Mo.App. 1940. In action in quantum meruit to recover reasonable value of services rendered by plaintiff at special request of deceased under agreement that plaintiff was to be compensated by bequest, instruction was not objectionable because of its reference to rule that where services are rendered by one person to another an obligation to pay for the same will be presumed.

Balsano v. Madden, 138 S.W.2d 660.

In action in quantum meruit to recover reasonable value of services rendered by plaintiff at special request of deceased on theory of an agreement that deceased was to compensate plaintiff by bequest, administrator's requested instruction that even though jury found that plaintiff had rendered services, yet if they found that deceased offered to make will leaving plaintiff his estate or any part thereof on condition that plaintiff would make her home with him and that plaintiff did not make her home with deceased, jury should not award plaintiff any sum of money on such proposed agreement, if any, was properly refused as foreign to the issues.

Balsano v. Madden, 138 S.W.2d 660.

Mo.App. 1943. In action to recover for services rendered by nephew to his great uncle during great uncle's life, instruction which told jury that when one renders valuable services for another, the benefit of which the other accepts, the law presumes that the person for whom the services were rendered contracted to pay the person performing the services the reasonable value thereof, was erroneous.

Runnels v. Allen, 170 S.W.2d 144.

Mo.App. 1944. In action against executor on quantum meruit for nursing services rendered decedent, instruction that the law would imply agreement to pay for services if decedent failed to carry out express agreement to leave all his property to plaintiff was erroneous but was not prejudicial to executor.

In re Stein's Estate, 177 S.W.2d 678.

Mo.App. 1945. An instruction that fact that one claiming compensation from decedent's estate for services rendered to decedent was named executor in decedent's will, bequeathing his estate to claimant's sons, gave claimant no claim against estate, was erroneous as misleading.

Runnels v. Allen's Estate, 184 S.W.2d 740.

Mo.App. 1946. In action on claim against estate for room, board and care, instructions that verdict must not be based on guesswork or speculation were not prejudicial as withdrawing from jury all of circumstantial evidence as to nature and extent of claimant's services.

Piburn v. Reed, 193 S.W.2d 789.

Mo.App. 1947. Instruction authorizing jury to find that there was implied promise to pay if plaintiff intended to have compensation for his services rendered to defendant's decedent during his lifetime and that such services were rendered under such circumstances that decedent expected or ought to have expected that they were to be paid for, even though there was no expressed contract for agreement by decedent to pay for such services was correct.

Evans v. Wall, 199 S.W.2d 908.

Mo.App. 1950. In action by son against executor of father's estate to recover sums expended by son in behalf of father during his lifetime, instructions which authorized recovery for money expended by son in paying his father's indebtedness and money spent by son on father's farm and in operation thereof and which did not expressly limit recovery to items listed in formal claim were not erroneous.

Geisendorfer v. Geisendorfer, 227 S.W. 2d 470.

⊂=451(4). Verdict and findings.

Mo.App. 1903. In proceedings to establish a claim against the estate of a decedent, the estate set up a counterclaim consisting of two matters. The court excluded from the consideration of the jury the second matter. On the first matter only one item was contested by plaintiff, and the jury were instructed to disallow this item. *Held*, that there was practically no issue on the counterclaim, and a general verdict for the claimant was not defective for failing to dispose of all the issues submitted.

Hunicke v. Thomas' Estate, 76 S.W. 659, 102 Mo.App. 129.

Mo.App. 1944. In action against executor for nursing services rendered decedent, verdict was not required to recite that plaintiff had given credit to estate for all payments and offsets to which it was entitled, and that balance claimed was justly due. Mo.R.S.A. § 192, V.A.M.S. § 464.250.

In re Stein's Estate, 177 S.W.2d 678.

⊂=452. New trial.

For cases from other jurisdictions, see other Key Number Digests.

For later cases see same Topic and Key Number in Pocket Parts

⇐453. Judgment.

⇐453 (1). Judgment by confession or default.

Mo.App. 1910. Where an action of replevin is against an executrix in her representative capacity, a default judgment for the value of the property, rendered against her personally, is irregular, if not void, and may be set aside on application therefor within the statutory period.

White v. McFarland, 128 S.W. 23, 148 Mo.App. 338.

⇐453 (2). Rendition, form and requisites.

A judgment in ordinary cases cannot be rendered against administrators de bonis propriis.

Mo. 1826. Laughlin v. McDonald, 1 Mo. 684.

Mo. 1884. Blondeau v. Sheridan, 81 Mo. 545.

Mo. 1842. In a suit by an executor or administrator, as such, the plaintiff cannot recover in his individual right.

Burdyne v. Mackey, 7 Mo. 374.

Mo. 1845. Where suit was brought against the administrator of a guardian, who had been removed, for money not paid over to his successor, the judgment must be de bonis testatoris, and not de bonis propriis.

Finney v. State, to Use of Estiss, 9 Mo. 227.

Mo. 1869. Ordinarily, where an administrator sues or is sued in his official character, the judgment should be entered against him in the same character, to be levied out of the assets of the testator or intestate.

Ranney v. Thomas, 45 Mo. 111.

Mo. 1889. The failure of an executor to plead the general statute of limitations will not invalidate a judgment against him.

Posthlewaite v. Ghiselin, 10 S.W. 482, 97 Mo. 420.

Though more than three regular terms of court allowed by law for the revival of causes against the personal representatives of deceased defendants elapsed after the suggestion of defendant's death, before steps are taken to revive the action, but the executor appears and pleads to the merits without objecting because of the delay, a judgment rendered against the latter is not void, so as to be liable to collateral attack.

Posthlewaite v. Ghiselin, 10 S.W. 482, 97 Mo. 420.

Mo. 1930. In suit against deceased's estate, recital in judgment that execution should issue did not render judgment erroneous. Rev.St.1919, § 1629, V.A.M.S. § 532.470.

Ragsdale v. Achuff, 27 S.W.2d 6, 324 Mo. 1159.

Mo. 1937. Trial court's finding in suit against plaintiff's brother, individually and as executor of their deceased father's will, for possession of deed from their deceased parents to plaintiff, that defendant, claiming to be sole owner of property conveyed under father's will, wrongfully took possession thereof and collected rent, and judgment against defendant for net amount of such rent, decided ultimate issue as to liability of decedent's estate or of defendant as executor, and further finding that rent was not due from him as executor was unnecessary. Mo.St.Ann. §§ 130, 131, pp. 80, 82, V.A.M.S. §§ 462.280, 462.290.

Lanphere v. Affeld, 99 S.W.2d 36.

Judgment against defendant individually, not against estate of which he was executor, for net rent collected by him from tenants of property conveyed by testator to plaintiff in suit for possession of deed, *held* proper, in absence of evidence that he was authorized as executor to take possession of and rent realty, of which he claimed to be sole owner under will. Mo.St.Ann. §§ 130, 131, pp. 80, 82, V.A.M.S. §§ 462.280, 462.290.

Lanphere v. Affeld, 99 S.W.2d 36.

Mo. 1937. Words "or from the estate of the said deceased," after judgment against executor personally for net rent collected from tenants of property conveyed by testator to one obtaining such judgment in suit for possession of deed, should be stricken from decree, where there was no evidence that defendant was authorized to or did take charge of realty or rents as executor, nor any finding or basis for finding that estate was liable for what he collected, but it appeared that he claimed whole title under will.

Schoenwetter v. Affeld, 99 S.W.2d 41.

Mo. 1948. If shown that there was a mutual understanding that claimant, who was a niece by marriage of decedent, and who made her home with decedent and his wife, was to be remunerated for services performed by her for decedent and wife by decedent and wife leaving "her all their combined estate", and that claimant performed agreement on her part, claimant was not obliged to only pursue a remedy in equity specifically performing alleged agreement, but she could waive the agreement and, based upon proof of her performance of services and a demonstration of the mutual understanding rebutting presumption that services were gratuitous, she could at law recover reasonable value of services rendered, but in such case recovery should not exceed in amount value of the property promised.

Kopp v. Traders Gate City Nat. Bank, 210 S.W.2d 49, 357 Mo. 659.

For references to other topics, see Descriptive-Word Index

Mo.App. 1879. In an action by an administrator to recover the possession of personal property, the court has power, on finding that the defendant is entitled to the property, to render judgment against the administrator, and to order the payment of the judgment out of the estate of the decedent.

State, to Use of Walsh, v. Dailey, 7 Mo. App. 548.

Mo.App. 1916. Where the plaintiff sued certain persons as administrators of the estate, the judgment could not run against them individually with an award of execution, but should have against them in their representative capacity.

Powers v. Conran, 182 S.W. 1012.

Mo.App. 1934. Judgment directing executrix to pay beneficiaries trust fund from assets of estate and making her individually liable if she failed to do so *held* not erroneous where executrix was also residuary legatee.

Bond v. Unsell, 72 S.W.2d 871.

Mo.App. 1934. In suit by heirs of devisee of interest in resulting trust after sale of realty by executor of holder of legal title, judgment for money against executor *held* proper, though no provision was made therein for its classification as a demand against estate.

Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.

⇐453 (3). Record and amendment.

For cases from other jurisdictions, see other Key Number Digests.

⇐453(4). Conclusiveness, operations, and effect.

Mo. 1827. A judgment against an administrator is no lien on the lands of the intestate, although the judgment be de bonis testatoris.

Scott v. Whitehill, 1 Mo. 764.

Mo. 1857. An administrator, in defending an action of foreclosure, should demand the fullest proof; but his failure to do so will not raise a presumption of fraud, authorizing the setting aside the judgment.

Cadwallader v. Cadwallader, 26 Mo. 76.

Mo.App. 1936. Allowance or a judgment in probate court is in nature of a judgment in rem against property in hands of administrator or executor in state of his appointment, and is not a personal judgment.

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

Mo.App. 1939. A judgment against administrator for value of services rendered to deceased was not subject to collateral attack in judgment creditor's proceeding for classification of judgment against administrator, where judgment was regular upon its face and there was nothing in record to indicate any infirmity therein.

Sanders v. Savage, 129 S.W.2d 1061, 234 Mo.App. 9.

⇐454. Execution and enforcement of judgment.

U.S.Mo. 1850. Under Missouri law a sheriff's sale in 1836 of lands of deceased debtor under judgment obtained against executors was not void.

Landes v. Brant, 51 U.S. 348, 10 How. 348, 13 L.Ed. 449.

After 18 months from the time of granting letters of administration or letters testamentary, an execution may issue on a judgment obtained against the testator or intestate, or against his administrator.

Mo. 1826. Beauchamp's Adm'rs v. Best's Adm'rs, 1 Mo. 661.

Mo. 1826. Scott v. Whitehill, 1 Mo. 691.

Mo. 1852. Act Jan. 25, 1817, § 5, enacted that all lands of a testator or intestate might be sold on execution against executors and administrators, "provided, no such lands shall be seized and sold until after the expiration of eighteen months from the death of such ancestor, or the date of the letters testamentary or letters of administration." *Held*, that, though the execution was issued and the land advertised for sale within the 18 months, yet the sale, being made after the lapse of that time, was valid.

Carson v. Walker, 16 Mo. 68.

Act Jan. 25, 1817, § 5, enacted that all lands of a testator or intestate might be sold on execution against executors and administrators, "provided no such lands shall be seized and sold until after the expiration of 18 months from the death of such ancestor or the date of the letters testamentary or letters of administration." Act Jan. 12, 1822, § 28, provides that no execution shall issue on any judgment obtained against an executor or administrator within one year. Testator died September 3, 1823. Judgments were recovered October 8, 1824; execution issued December 17, 1824; notice of sale February 25, 1825; and the sale on April 18, 1825. *Held*, that under either of the statutes the sale was substantially in conformity with the provisions of the law.

Carson v. Walker, 16 Mo. 68.

Mo. 1874. A judgment rendered in the circuit court against an administrator will not authorize an execution in that tribunal;

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but it must be executed by a proceeding in the probate court.

Wernecke v. Wood, 58 Mo. 352.

Mo. 1902. Rev.St.1899, § 3177, V.A.M.S. § 513.075, has no reference to the time within which a judgment shall be classified, but when read in its proper connection only forbids an execution to issue thereon against the estate of the deceased, and requires it to be classified and paid under the supervision of the probate court.

Ryans v. Boogher, 69 S.W. 1048, 169 Mo. 673.

Mo.App. 1878. A judgment rendered in Illinois against an administrator in Missouri is not enforceable against the estate located in Missouri.

Rentschler v. Jamison, 6 Mo.App. 135.

Mo.App. 1927. Judgment, awarding execution against executor for services to decedent, *held* erroneous.

Wharton v. Denny, 296 S.W. 183, 222 Mo.App. 260.

Mo.App. 1930. Decree establishing lien on proceeds of mortgaged property sold by agreement erroneously ordered execution issue.

State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.

⇐455. Appeal and error.

Mo. 1858. After plaintiff has established his demand against a decedent's estate by the verdict of the jury and the judgment of the court, the mere omission of the preliminary oath required by statute to authorize allowances against an estate in the county court is not cause for reversal; the oath not having been called for in the trial of the case, and no objection on that ground made in the trial court.

Fath v. Meyers' Adm'r, 27 Mo. 568.

Mo. 1874. Where it does not appear from the whole record that injury has resulted to one who asked leave to file an amended affidavit in a proceeding against an administrator for embezzlement of notes, or that the evidence offered on the claims sought to be inserted could have changed the result of the case, no reversal can be had because of such refusal.

Stewart v. Glenn, 58 Mo. 481.

Mo. 1894. Where, in an action against an estate for money loaned to deceased, the main issues as to whether plaintiff in fact loaned deceased the sum claimed on the date stated, and whether deceased made the several payments at the dates given, are presented to the jury in a clear and satisfactory charge, including an instruction that these issues could not be found for plaintiff, except on the greater weight of the evidence, verdict for plaintiff is conclusive.

Crawford v. Doppler, 25 S.W. 93, 120 Mo. 362.

Mo. 1901. A circuit court rendered judgment showing a balance of over $6,000 against an executor. From that judgment the executor appealed, but gave no bond. *Held* that, as the judgment was a judgment against him in person, the appeal did not operate as a supersedeas.

State ex rel. Green v. Henderson, 64 S. W. 138, 164 Mo. 347, 86 Am.St.Rep. 618.

Mo. 1929. Judgment for administratrix in action for death should be reversed and cause remanded, where petition failed to show right of administratrix to sue. Rev.St. 1919, § 4217, V.A.M.S. § 537.070.

O'Donnell v. Wells, 21 S.W.2d 762, 323 Mo. 1170.

Mo. 1931. Validity of clause of will was not before court reviewing dismissal of executor's action for incapacity to sue.

Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

Mo. 1952. Where person suing administrator for reasonable value of services rendered to deceased pleaded and proved a specific promise by deceased to pay for the services, she took upon herself a greater burden than was required, and administrator could not complain of instruction placing such additional burden on such person.

Muench v. South Side Nat. Bank, 251 S. W.2d 1.

Mo.App. 1880. Gen.St.1865, c. 127, provides that on appeals from the probate court no executor or administrator shall be required to enter into a bond in order to entitle him to an appeal. Gen.St.1865, p. 684, provides that on appeals from the circuit court to the appellate court, when the appellant shall be an executor or administrator and the action shall be by or against him as such, the order allowing appeal shall stay execution. *Held*, that these provisions do not make a bond given by an executor void, since, although he was not obliged to give a bond, he might have chosen to do so, and there was no evidence that he was compelled to do it.

Schmucker v. Steidemann, 8 Mo.App. 302.

Mo.App. 1892. In an action against an administrator and others, error in entering judgment against the administrator as an individual may be corrected, either in the trial court or on appeal; but the appellate

For references to other topics, see Descriptive-Word Index

court has adopted the practice of remanding the cause with instructions to enter proper judgment.

Bates v. Scheik, 47 Mo.App. 642.

Mo.App. 1892. Where the court had no jurisdiction to render a judgment in favor of an administrator against the heirs and their surety on their appeal bond, on the heirs taking an appeal from a judgment of the probate court allowing a claim against the estate of the decedent, the error may be corrected on writ of error.

Harrington v. Evans, 49 Mo.App. 372.

Mo.App. 1904. Where the preponderance of evidence sustains the court's finding as to the residence of decedents in a suit by an administrator, it will not be disturbed.

Sommer v. Franklin Bank, 83 S.W. 1025, 108 Mo.App. 490.

Mo.App. 1927. In action for services, defendant cannot insist for first time on appeal that statement of account was insufficient.

Lauf v. Wiegersen, 295 S.W. 495.

Mo.App. 1927. Award of execution against executor for services rendered to decedent *held* not reversible error.

Wharton v. Denny, 296 S.W. 183, 222 Mo. App. 260.

⇐456. Costs.

⇐456 (1). Rights and liabilities in general.

Mo. 1922. Where the first count of an action against a decedent estate was in equity but was eliminated by demurrer, the other counts being at law, the action became one at law and, having been begun in circuit court within one year of the date of administration, under Rev.St.1909, § 217, V.A.M.S. § 464.090, in force at that time, no costs were recoverable by plaintiff.

Enright v. Schaden, 242 S.W. 89.

Mo.App. 1885. In the case of an appeal by an administrator, damages will not be allowed, on the ground that the appeal was frivolous, where the court cannot determine that the administrator did not take the appeal in good faith, with a view to protecting the estate in his hands and the sureties on his bond.

Lewis v. Castello, 17 Mo.App. 593.

Mo.App. 1928. Where counterclaim, if allowed, would be less than note sued for, administrator could recover reasonable attorney's fee.

Thompson v. Bratcher, 8 S.W.2d 1027.

⇐456 (2). Persons, property, and funds liable in general.

Mo. 1944. In grantor's action against grantee's executrix to have deed for land decreed a mortgage, assessment of costs against grantor was not an abuse of discretion notwithstanding grantor was the successful party as far as his substantive cause of action was concerned. Mo.R.S.A. §§ 1408, 1409, V.A.M.S. §§ 514.080, 514.090.

Brewster v. Terry, 180 S.W.2d 600, 352 Mo. 967, transferred 172 S.W.2d 5.

Mo.App. 1885. Where a public administrator undertakes the administration of an estate without authority, the estate is not brought into the custody of the court, and cannot be charged with the costs of litigation prosecuted by him.

Lewis v. McCabe, 16 Mo.App. 398.

Mo.App. 1895. Rev.St. § 210, V.A.M.S. § 464.090, provides that, if any person commence a suit of any kind in the circuit court against an estate within one year from the date of the administration, he may recover judgment, but shall pay the costs. *Held*, that a suit of any kind is one which may be brought on a legal demand that would fall within one of the seven classes of legal demands that may be presented, allowed, and classified by the probate court, under section 183, and actions within the jurisdiction of the probate court; and hence plaintiff in an action in equity against the husband's executor to recover money advanced to the wife for necessaries is not liable for costs, though brought within one year from the date of administration.

Reed v. Crissey, 63 Mo.App. 184.

Mo.App. 1902. Where creditors of an intestate unsuccessfully claim in proceedings against the public administrator that funds in his hands are assets of the estate, rather than the property of minor heirs, they are taxable with the costs.

Elstroth v. Young, 68 S.W. 100, 94 Mo. App. 351.

⇐456 (3). Liability of executor or administrator in general.

Mo.App. 1940. Where action in quantum meruit for reasonable value of services rendered by plaintiff at deceased's special request was instituted against administrator within six months from date of administration, trial court erred in taxing costs against administrator instead of plaintiff notwithstanding plaintiff recovered for value of services rendered. Mo.St.Ann. § 209, p. 136, V.A.M.S. § 464.090.

Balsano v. Madden, 138 S.W.2d 660.

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⇐456 (4). Unreasonable resistance, and refusal to refer claim or consent to determination on settlement of accounts.

For cases from other jurisdictions, see other Key Number Digests.

⇐456 (5). Individual liability of executor or administrator.

U.S.Mo. 1839. Where defendant executors in ejectment had no interest in the land by virtue of their letters testamentary, but might have had an interest by the will of their testator, it was proper that a judgment against them for costs be de bonis propriis.

Bagnell v. Broderick, 38 U.S. 436, 13 Pet. 436, 10 L.Ed. 235.

Mo. 1852. It is the general rule of law that, if the cause of action accrues to the testator or the intestate in his lifetime, the executor or administrator, suing and failing to recover, is not liable for costs de bonis propriis; but it is otherwise if the cause of action accrues to the executor or administrator.

Wooldridge v. Draper, 15 Mo. 470.

Mo. 1875. In a suit by an administrator on a cause of action which accrued during the lifetime of his intestate, the administrator is not personally liable for costs. The judgment on that score should be against him in his representative capacity, to be satisfied out of the assets of the estate.

Ross v. Alleman, 60 Mo. 269.

⇐456(6)-456(7).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐457. Liabilities for conduct of action or defense.

Mo. 1845. An administrator is bound to plead the special statute bar of four years in an action for any debt barred thereby, and it will be waste if he does not do it; but he is not bound to plead the general statute of limitations.

Wiggins v. Lovering's Adm'r, 9 Mo. 262.

XI. ACCOUNTING AND SETTLEMENT.

(A) DUTY TO ACCOUNT.

⇐458. Nature and grounds.

Mo. 1943. Under statutes dealing with regular settlements of personal representatives and with settlements after revocation of such representatives' letters it is contemplated that such representatives shall give a true accounting in detail of receipts and disbursements. Mo.R.S.A. §§ 213, 220, 221, 224, 225, V.A.M.S. §§ 465.010, 465.090, 465.100, 465.110, 465.120.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1905. The fact that an intestate owed her administrator a sum larger than the value of the estate left by her did not excuse the administrator for a failure to inventory and account for all the money collected by him as administrator, but his remedy to collect his debt was to present his claim to the probate court for allowance, and to have a special administrator appointed as prescribed by Rev.St.1899, § 205, V.A.M.S. § 464.230.

State ex rel. Cardwell v. Stuart, 86 S.W. 471, 111 Mo.App. 478.

⇐459. Time for accounting.

Mo. 1897. The statute of 1885 (Act March 7, 1885) permits the administrator himself to make final settlements prior to having collected all the assets, if the majority of those entitled to distribution make application to have the uncollected assets delivered to some person to collect and distribute the same to them.

Rutledge v. Simpson's Adm'r, 42 S.W. 820, 141 Mo. 290.

Mo. 1902. An executor has no right to make a final settlement until he has discharged the debts of the deceased which have been reduced to judgment. Until then the estate has not been fully administered, and the devisees and legatees have no right to receive it into their hands.

Ryans v. Boogher, 69 S.W. 1048, 169 Mo. 673.

After the affirmance of a judgment against decedent's estate, an appeal from a judgment of the probate court refusing to permit an executor to make a final settlement is without merit, and it is the duty of the executor to pay the judgment before asking to make final settlement.

Ryans v. Boogher, 69 S.W. 1048, 169 Mo. 673.

Mo. 1915. Until an estate's liability upon a demand on which action was pending in the circuit court is determined the estate is not fully administered.

State ex rel. Knisely v. Holtcamp, 181 S.W. 1007, 266 Mo. 347.

Mo. 1943. The statute providing that it must appear as a prerequisite to final settlement of a decedent's estate that the estate has been fully administered, and all debts paid refer to allowed debts and to expenses of administration which have statutory pri-

ority and must be paid. Mo.R.S.A. §§ 220, 224, 230, V.A.M.S. §§ 465.100, 465.110, 465.170.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1936. Final settlement of decedent's estate cannot be lawfully made by executor until all matters respecting it are finished and closed up, all debts are paid so far as its assets permit, all litigation is ended, and estate is fully administered. Mo.St. Ann. § 231, p. 152, V.A.M.S. § 465.170.

State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

Mo.App. 1942. A probate court has no right to consider and approve a final settlement of decedent's estate and order distribution of assets thereof while claims are pending against estate.

In re Rohde's Estate, 157 S.W.2d 527.

Mo.App. 1949. Where affidavit for appeal from judgment in probate court in favor of claimant against decedent's estate was pending and estate had thus not been fully administered, order permitting administrator to file final settlement and be finally discharged was void for want of jurisdiction, and administration was still pending for purpose of mandamus proceeding to compel probate court to certify record to circuit court for hearing on appeal. Mo.R.S.A. §§ 230, 283, V.A.M.S. §§ 465.170, 467.010.

State ex rel. Jones v. Davis, 216 S.W.2d 155, 240 Mo.App. 411.

⇐460. Who entitled to require accounting.

Mo.App. 1911. The right to call an executor or administrator to account extends to any person in interest in the estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

⇐461. Who liable in general.

Mo. 1886. Rev.St.1879, § 48, Gen.St. c. 120, § 47, V.A.M.S. § 461.550, providing that if any administrator die, resign, or his letters be revoked, he or his legal representatives shall account to his successor, has no application to the settlement of a special administrator in turning over the funds in his hands to an executor qualifying under the will of decedent.

Robards v. Lamb, 1 S.W. 222, 89 Mo. 303, affirmed 8 S.Ct. 1031, 127 U.S. 58, 32 L.Ed. 60.

Under Rev.St.1889, § 48, V.A.M.S. § 461.560, providing that an executor, upon his resignation, shall make a final settlement of the estate with his successor, a settlement made by an executor on his resignation as executor, but before the appointment of his successor, is not final and conclusive as to the successor.

Mo. 1893. Emmons v. Gordon, 24 S.W. 146, affirmed in banc 25 S.W. 938.

Mo. 1894. Emmons v. Gordon, 28 S.W. 863, 125 Mo. 636.

Mo.App. 1906. Where the letters of an executrix were revoked on the same day they were granted, and she never took charge of any part of the estate, nor attempted to inventory or charge herself therewith, she could not be compelled by an administrator pendente lite subsequently appointed, as authorized by Rev.St.1890, § 13, V.A.M.S. §§ 461.080, 461.090, to account for any portion of decedent's property, under sections 47 and 48, requiring an executor to account to his successor for assets of the estate in his hands.

Hanley v. Holton, 96 S.W. 691, 120 Mo. App. 393.

⇐462. Acting in different capacities.

Mo. 1917. A statement in an executor's inventory that the estate had a residuary interest in certain land whose legal title was in him cannot affect such executor's right to apply for an accounting to the circuit court of the trust, which existed independent of his position as executor.

Johnston v. Grice, 199 S.W. 409, 272 Mo. 423.

Mo. 1936. Offices of executor and testamentary trustee are separate, though they may be conferred upon and exercised by same person.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

Mo. 1950. In action for severance of trust and income therefrom from testator's estate, and delivery thereof to executors of testator, as trustees of trust for testator's minor daughter, after order by probate court of sale of percentage of stock to pay debts, charges and expenses of administration of estate, exclusion of proof by curator of minor seeking proceeds and income from proceeds, of proceedings in probate court showing how and on what terms sale of testator's stock was made, which terms were in record, was not erroneous.

Moran v. Sutter, 228 S.W.2d 682, 360 Mo. 304.

Mo. 1952. The office of executor and testamentary trustee are separate and do not merge, though they be conferred upon, and exercised by, same person.

In re Schield's Estate, 250 S.W.2d 151.

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⚖463-464.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⚖465. Property to be included.

Mo. 1892. At common law, and in those states generally where the common law has been adopted, where an administrator came into possession of rents from the realty or the proceeds of sale, he was chargeable therefor individually, as a trustee or trespasser, but not in his character as administrator.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

The administrator and his sureties are responsible for rents and the proceeds of realty received by him by color of his authority as administrator.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo. 1897. The administratrix of a surviving partner cannot be required to account in the state courts for partnership assets which are outside the state until such time as the proceeds thereof actually come into her hands, within the state.

Scudder v. Ames, 43 S.W. 659, 142 Mo. 187.

Mo. 1901. Where a will positively directs the executor to sell testator's real estate, a successor of the executor who sells the property does not hold the proceeds as trustee for the heirs, but as assets of the estate, and may be compelled to account therefor in the county court, under Rev.St.1889, §§ 47, 48, V.A.M.S. §§ 461.550, 461.560.

Francisco v. Wingfield, 61 S.W. 842, 161 Mo. 542.

Mo.App. 1926. Executor of one having life estate under husband's will, with power to dispose of and consume property for her own support, comfort, or enjoyment, *held* not to have burden of accounting for all property shown to have come to testatrix under her husband's will.

Mauthe v. Breckenridge, 284 S.W. 145, 219 Mo.App. 694.

Mo.App. 1931. Executor must account as such for trust property coming into his hands from deceased.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

Mo.App. 1936. Executor accepting trust fund as personal trust bestowed upon him on account of personal confidence of testator so that powers of executor were not enlarged thereby *held* liable to account for trust fund and pay it over to parties entitled thereto or to some one duly authorized to receive it.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Mo.App. 1943. Where notes held by intestate at his death were listed in the inventory, notes became "assets" in administrator's hands to be accounted for in final settlement, and if notes were valid obligations, administrator had duty to charge himself with them in his final settlement, and if notes were not valid obligations but had been paid, administrator had right under statute to request the court to give him credit for the amount of the notes. Mo.R.S.A. §§ 100, 231, V.A.M.S. §§ 462.170, 465.180.

In re Nelson's Estate, 166 S.W.2d 333, 237 Mo.App. 28.

⚖466. Release from liability.

Mo. 1828. Permission from the court to an administrator "to retain in his possession the money of minors, paying lawful interest therefor," in pursuance of Act Jan. 21, 1815, does not cancel the obligation to make annual and final settlements, or interfere with the power or duty of the security to compel him to do so after the expiration of the time for which the money was loaned.

Devore, to Use of Simonds, v. Pitman, 3 Mo. 179, 182.

Mo. 1866. A final settlement of an administrator's account must be the act and judgment of the court, of which there must be some record; and such a settlement cannot be presumed.

Dillion's Adm'r v. Bates, 39 Mo. 292.

Mo. 1895. Under Rev.St.1889, § 47, V.A.M.S. § 461.550, requiring an administrator who has been removed to "account for, pay, and deliver to his successor * * * all moneys, real and personal property" which came into his hands in that capacity, the burden is on him to show that he has made a full accounting, and he is not entitled to credit for certain items of account solely on the ground that his successor filed no exception to their allowance.

In re Glover, 29 S.W. 982, 127 Mo. 153.

⚖467. Failure to account.

For cases from other jurisdictions, see other Key Number Digests.

(B) PROCEEDINGS FOR ACCOUNTING.

⚖468. Nature and form of remedy.

U.S.Mo. 1868. A court of chancery as incident to power to enforce trust and make those holding fiduciary relation account has jurisdiction to compel executors and adminis-

trators to account and distribute assets in their hands.

Payne v. Hook, 74 U.S. 425, 7 Wall. 425, 19 L.Ed. 260.

Mo.App. 1948. Statute requiring executor to make final settlement after having published a proper notice, and statute providing that, if it appears to court that such notice was duly published and that estate has been fully administered and all debts paid, court should make final settlement, are to be construed together, and mean that the executor shall make or prepare and file his final settlement and that the court, all other statutory conditions having been complied with, shall approve the settlement. Mo.R.S.A. §§ 229, 230, V.A.M.S. §§ 465.160, 465.170.

In re McArthur's Estate, 207 S.W.2d 546, 240 Mo.App. 455.

⇐469. Jurisdiction of courts.

⇐469(1). In general.

Mo.App. 1919. Where an heir has appropriated an estate without administration and intermingled it with her own for five years, and after her it was handled by her executor for six years, the probate court did not have jurisdiction of an action by an administrator for an accounting, under Rev. St.1909, §§ 70–74, V.A.M.S. §§ 462.400 to 462.440.

Meyer v. Nischwitz, 199 S.W. 744, 198 Mo.App. 101.

Mo.App. 1920. Charges against an estate arising and paid in the course of the administration may be allowed at final settlement under Rev.St.1909, § 239, and are not within section 230, requiring allowance before payment, and the administratrix has an adequate remedy therefor in the probate court and cannot invoke the equitable jurisdiction of the circuit court to decree a credit in her accounts therefor.

Thompson v. Thompson, 217 S.W. 863.

As Const. art. 6, § 34, and Rev.St.1909, § 4056, invest probate courts with exclusive jurisdiction over probate business, including "settling the accounts of executors and administrators," with right of appeal, the fact that the administratrix paid claims in disregard of Rev.St.1909, § 230, V.A.M.S. § 465.090, "with the advice and consent of defendants," the heirs, formed no ground for equitable jurisdiction.

Thompson v. Thompson, 217 S.W. 863.

Mo.App. 1936. Although probate court has no purely equitable jurisdiction to administer trust fund, it does have jurisdiction to require executor who has taken trust fund in charge along with other assets of estate to account therefor to parties entitled thereto.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Jurisdiction of probate court over trust fund created by will which provided for administration of fund by executor can be discharged only by final order of distribution, directing payment to person lawfully entitled to demand and receive fund and upon full compliance with such order. Mo.St.Ann. § 567, p. 344, V.A.M.S. § 468.620.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

⇐469(2). After death, removal, or resignation of executor or administrator.

Mo. 1878. Wag.St. p. 81, § 68, provides that, if any executor or administrator die, the court shall have power, on the application of his successor, to ascertain the amount of money in the hands of the deceased executor or administrator in his representative capacity at the time of his death, and to render judgment against his securities for the amount so ascertained. By section 69, p. 82, if an executor or administrator die, the court has power, on the application of his successor, to ascertain what quantity and kind of property was in the hands of the deceased executor or administrator, and whether the representatives of such decedent should deliver the same to the successor; and by section 47, p. 77, in case of the death of an executor or administrator, he or his representatives shall account for and deliver to the successor all money and personal property, etc., of the deceased, at such times and in such manner as the court shall order. *Held*, that where an administrator de bonis non brought proceedings in the county court, alleging that the former administrator had failed to account for proceeds of sales of property, and he prayed for an amended settlement, and the representative of the former administrator answered, setting up a counterclaim, the court had jurisdiction to render judgment for defendant; the remedy not being exclusively under sections 47, 68 and 69.

Seymour v. Seymour, 67 Mo. 303.

Mo. 1901. Under Rev.St.1889, §§ 47, 48, V.A.M.S. §§ 461.550, 461.560, requiring executors or administrators on their removal or resignation to deliver all personal property to their successors, and making it the duty of the successors to move the court to compel such executors to make final settlement, the county court has jurisdiction of the application of a succeeding administrator to force the public administrator, who took

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charge of an estate on the removal of an executor thereof, to make a final accounting.

Francisco v. Wingfield, 61 S.W. 842, 161 Mo. 542.

⇐469 (3). After final settlement and discharge.

Mo. 1845. Courts of equity have jurisdiction of a bill charging an executor with waste in not accounting for property which had come to his hands, although a final settlement has been made with the county court.

Clark v. Henry's Adm'r, 9 Mo. 339.

Mo. 1848. After a final settlement by an administrator, and the appointment of an administrator de bonis non, the former administrator has no right in court to overhaul his accounts; but his remedy is by a bill in equity for relief, and the power of a probate court over his accounts ceases after the final settlement.

State, to Use of Collins, v. Stephenson, 12 Mo. 178.

⇐470. Limitations and laches.

For cases from other jurisdictions, see other Key Number Digests.

⇐471. Proceedings by executor or administrator.

Mo. 1873. In 1861, an executor, after giving the statutory notice, filed his final settlement, but on his motion it was continued till the next term. In 1870, without further notification, he withdrew it, and made a corrected one. *Held*, that the latter was invalid.

Brashears v. Hicklin, 54 Mo. 102.

Mo. 1883. Publication of notice of the final settlement of an administrator in the English language, and on the English side of a paper, one side of which is printed in English and the other in German, is sufficient.

McLean v. Bergner, 80 Mo. 414.

Mo. 1886. A special administrator, appointed pending the contested probate of a will, may settle, and be discharged, without giving previous notice of the contemplated settlement.

Robards v. Lamb, 1 S.W. 222, 89 Mo. 303, affirmed 8 S.Ct. 1031, 127 U.S. 58, 32 L.Ed. 60.

Mo. 1894. The law does not require a notice of final settlement to be given where an executor or administrator intends to resign or has resigned.

Emmons v. Gordon, 28 S.W. 863, 125 Mo. 636.

Mo. 1901. Under Rev.St.1899, § 232, V.A.M.S. § 465.160, fixing the term of court at which an administrator shall render his final settlement, and directing the publication of a notice in a newspaper of an intention to make the final settlement at the designated term of court "for four weeks prior" to such term, a notice published March 24th and 31st and April 7th and 14th for the term of court beginning May 8th is sufficient, as the statute merely requires that the first of the four weekly publications shall be four weeks before the term of court; and hence a creditor of the estate cannot maintain a suit to vacate the judgment of final settlement and discharge of the administrator entered at such term of court, though he has discovered assets of the estate which were not administered, for such judgment is res judicata.

Ratliff v. Magee, 65 S.W. 713, 165 Mo. 461.

Mo. 1902. The fact that the final settlement of an administrator was docketed on the second day of the term and not filed till the fourth day is immaterial in a suit to set aside such settlement, when the evidence shows that the administrator was busy in another court during the week.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo. 1943. Under statutes dealing with final settlements between an outgoing personal representative and his successor, the settlement of the outgoing executor or administrator with his successor is made voluntarily or on motion of the latter on "due" notice to the retiring incumbent alone, and there is no notice to creditors. Mo.R.S.A. §§ 48, 49, V.A.M.S. §§ 461.550, 461.560.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1877. A notice of final settlement of an estate, in a German newspaper, is not a legal notice, though published in English.

Heitkamp v. Biedenstein, 3 Mo.App. 450, following Graham v. King, 50 Mo. 22, 11 Am.Rep. 401.

Mo.App. 1898. The filing of a petition in the circuit court of an administrator's bond, after the publication of the notice of final settlement of an administrator, did not have the effect to hold in abeyance the settlement until the determination of the suit, and the probate court was authorized to proceed with the settlement, notwithstanding the pendency of the suit upon the bond.

State, to Use of Cardwell, v. Stuart, 74 Mo.App. 182.

Mo.App. 1928. Purpose of requiring administrator to give notice of final settlement

For references to other topics, see Descriptive-Word Index

is to afford interested parties opportunity to appear and protect their interests.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Mo.App. 1940. The probate court had no jurisdiction of proceedings for final settlement by executor, in absence of statutory notice that such settlement would be made.

Thompson's Estate v. Martin, 133 S.W.2d 677.

⇐472. Special proceedings to compel accounting.

C.C.A.Mo. 1948. A probate court in Illinois can compel an executor or administrator to account at any time and may enter judgment against him for loss occasioned to estate by his wrongful acts.

Turner v. Alton Banking & Trust Co., 166 F.2d 305.

Mo. 1866. Courts of probate have no authority to impose a fine on an administrator for failure to settle when cited to do so; the statute providing only for their attachment and imprisonment after a rule on them to show cause why they should not be proceeded against. Rev.Code 1855, p. 828, § 31.

Greene County v. Rose, 38 Mo. 390.

Mo.App. 1928. Statutory notice must be given before probate court has jurisdiction to order final settlement and distribution. V.A.M.S. § 465.160.

State ex rel. Aufderheide v. Stolte, 1 S.W.2d 209.

Where administratrix tendered final settlement of estate, on court's order, statutory notice published by probate judge in name of administratrix, but without her authority, *held* sufficient compliance with statute providing that administrator shall publish notice. V.A.M.S. § 465.160.

State ex rel. Aufderheide v. Stolte, 1 S.W.2d 209.

Probate court *held* unauthorized to make final settlement while suit by administratrix was pending, whether or not administratrix had prosecuted suit diligently. V.A.M.S. § 465.170.

State ex rel. Aufderheide v. Stolte, 1 S.W.2d 209.

"Full administration of estate," under statute authorizing probate court to make final settlement, contemplates collection of all claims and payment of all debts. V.A.M.S. § 465.170.

State ex rel. Aufderheide v. Stolte, 1 S.W.2d 209.

⇐473. Actions for accounting, and administration suits.

⇐473(1). In general.

Mo.App. 1940. Where no attack was made upon sufficiency of affidavit filed by administratrix for purpose of transferring proceeding for settlement of her account to the circuit court, and sole question raised was that affidavit was false and untrue and made for purpose of vexation and delay and to usurp jurisdiction of the probate court, cause was properly transferred to the circuit court upon filing of the affidavit.

In re Helm's Estate, 136 S.W.2d 421.

The probate judge cannot go behind affidavit filed by administratrix for purpose of transferring proceeding for settlement of her account to the circuit court or hear oral testimony to ascertain its truth or falsity, nor may the circuit court, wherein cause is lodged pursuant to such affidavit, do so.

In re Helm's Estate, 136 S.W.2d 421.

⇐473(2). Parties and process.

U.S.Mo. 1888. Rev.St.Mo. c. 1, art. 1, § 14, Mo.St.Ann. §§ 13, 14, p. 14, V.A.M.S. §§ 461.080, 461.090, authorizing special administrator, having charge of estate during pendency of suit to have a final settlement of accounts with regular administrator, without giving notice to distributees, which settlement, in absence of fraud, is deemed conclusive against such distributees is not unconstitutional.

Robards v. Lamb, 8 S.Ct. 1031, 127 U.S. 58, 32 L.Ed. 60.

Mo. 1866. In a proceeding in equity by a distributee in pursuit of a fund which has come into the hands of the trustee under the will of a deceased administrator, where an account is necessary to ascertain the shares, or the parties in interest stand in different classes, or the entirety is in any way to be dealt with, all the distributees must be made parties before a final decree can be rendered; and it may be doubted whether the trustee has not a right to claim that this shall be done for his protection, and whether he can be compelled to part with any portion of the trust fund until all the parties are brought before the court, so that the whole matter may be determined at once.

Dillon's Adm'r v. Bates, 39 Mo. 292.

⇐473(3). Pleading.

Mo.App. 1919. Evidence sustained finding as to amount due in administrator's action for accounting.

Meyer v. Nischwitz, 199 S.W. 744, 198 Mo.App. 101.

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⊂=473(4). Evidence.

Mo. 1898. The burden of proof is on one who charges maladministration by administrators, except that, when they admit or it is shown that they have received assets, they must account for or produce them.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

Mo. 1946. In suit against executor of plaintiff's deceased aunt to recover amount allegedly paid over by plaintiff's deceased grandmother to plaintiff's aunt for plaintiff, evidence warranted chancellor's finding for executor.

Maguire v. Wander, 193 S.W.2d 900.

Mo.App. 1919. In an administrator's action for an accounting as to intestate's property appropriated by defendant, and intermingled for 11 years, evidence *held* sufficient to sustain a finding as to the amount due.

Meyer v. Nischwitz, 199 S.W. 744, 198 Mo.App. 101.

⊂=473 (5). Trial, judgment, and review.

C.C.Mo. 1882. Where the proof fails to furnish a proper basis for an accounting, but enough appears to make it desirable that the real facts be made to appear, the court may, in its discretion, refer the case to a master, with power to take further testimony and report thereon as to both law and fact.

Ridenbaugh v. Burnes, 14 F. 93.

Mo.App. 1907. In an action brought under Rev.St.1899, § 48, Ann.St.1906, p. 352, V.A.M.S. § 461.560, to compel an administrator after removal to make his final settlement, where the sureties were made parties and duly notified, judgment should be rendered against the administrator and his sureties.

State ex rel. Langston v. Canterbury, 101 S.W. 678, 124 Mo.App. 241.

Mo.App. 1940. In proceeding, transferred from probate court to circuit court, growing out of final report and settlement of administratrix, a finding of facts and conclusions of law was not required. Mo.St. Ann. § 952, p. 1225, V.A.M.S. § 510.310.

In re Helm's Estate, 136 S.W.2d 421.

⊂=473 (6). Costs.

For cases from other jurisdictions, see other Key Number Digests.

(C) CHARGES AND CREDITS.

⊂=475. Charges in general.

Mo. 1870. An administrator is chargeable with the proceeds of the sale of real estate, though the sale was made without an order of the probate court therefor.

State, to Use of Peppler, v. Scholl, 47 Mo. 84.

Mo.App. 1880. A testator bequeathed to his wife certain personal property, and this she sold, and with the proceeds paid certain debts of the estate. This property was not charged in the inventory or appraised, but for the debts paid with it credit was given to the executors in their settlement. The court debited the executors with the proceeds of the property. *Held*, that an exception of the executors to this action was well taken.

Schoeneich v. Reed, 8 Mo.App. 356.

Mo.App. 1891. Where an administrator arranged with a mortgage creditor of the estate that the latter should be paid out of the proceeds of a sale of the secured assets, and the administrator accordingly made the sale, and drew his check as administrator in favor of such creditor, the debt was thereby satisfied, and only the balance of the proceeds of the sale was chargeable against the administrator, although the administrator declared that he purchased the claim for the widow.

In re Meeker's Estate, 45 Mo.App. 186.

Mo.App. 1917. Administrator is not chargeable on final settlement with note given by him to deceased, where he had not inventoried it, nor charged it against himself.

Weber v. Oviatt, 194 S.W. 80.

Mo.App. 1940. On final settlement of an estate, probate judge correctly surcharged executor with an overcharge of commissions and properly credited him with an item which had been twice charged to executor.

In re Flynn's Estate, 142 S.W.2d 1069.

A note which was charged in first settlement of decedent's estate, and which was afterwards collected, was not subject to again being charged to the executor.

In re Flynn's Estate, 142 S.W.2d 1069.

⊂=476½. Increase of assets.

For cases from other jurisdictions, see other Key Number Digests.

⊂=477. Rents, profits, and income.

Mo.App. 1910. If executor is chargeable with rent of lands of estate, he is liable therefor in his settlement with probate court.

Williams v. Williams, 129 S.W. 454, 145 Mo.App. 382.

⊂=478. Interest.

Mo. 1851. An administrator is chargeable with interest upon uncollected notes

in his hands at the rate they bear, and is entitled to credit for interest on payments made by him.

Stong v. Wilkson, 14 Mo. 116.

Mo. 1876. An administrator should be charged in respect to notes and securities in his hands the rate of interest they respectively bear—on moneys legally accounted for, the interest actually earned thereon, or which might have been earned, had he complied with the orders of the court in respect to its investment; on money in his hands not reported according to law he should be charged 10 per cent., with annual rests; and on notes returned as insolvent he should be credited with any interest that may have been charged to him thereon.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1880. In a proceeding by an administrator de bonis non to ascertain the amount of money and property in the hands of the former administrator, whose letters had been revoked, it appeared that the former administrator sold property belonging to the estate and received in payment notes executed by the purchasers. The persons executing the notes were solvent, and payment of them could have been enforced. Some of the notes were paid. It also appeared that he took charge of the estate, and that it remained in his hands unsettled until his letters were revoked, about 18 years afterwards. No reasons were disclosed why the estate could not have been finally settled within 3 or 4 years. *Held*, that he was properly charged with interest at 10 per cent., with three rests.

Scott v. Crews, 72 Mo. 261.

Mo. 1880. An administrator was properly charged in his settlement with interest on a sum invested by him, without the advice or direction of the court, in the bonds of a religious society secured by a deed of trust on a church building where such bonds, though long past due, have never been paid.

Garesche v. Priest, 9 Mo.App. 270, affirmed 78 Mo. 126.

Mo. 1884. The mercantile method of computing interest without rests or application of interest to current disbursements is unsuited to a long account by an executor extending through many years.

Cruce v. Cruce, 81 Mo. 676.

Mo. 1889. It appeared that at six annual settlements of administrators' accounts there was a considerable sum in the hands of the administrators; that a large part of the assets were notes belonging to the estate; and that the probate court did not, under St.1865, p. 493, § 55, giving it an equitable control in requiring administrators to account for interest on money of the estate used or loaned by them, require interest to be accounted for on the settlements. It did not appear that any money of the estate was loaned or used by the administrators. *Held*, that interest on the balance in the administrators' hands during the administration will not be required on a final settlement 19 years afterwards.

Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo. 1916. Interest paid by executor on loan obtained on stock according to an agreement between himself and principal beneficiary in anticipation of his agreed commission and before final settlement *held* not a charge against the estate.

In re Bryan's Estate, 190 S.W. 581.

Mo.App. 1879. An executor who has committed a devastavit may be charged with interest at the rate of 10 per cent. See,

James v. Withinton, 7 Mo.App. 575, memorandum.

Mo.App. 1896. If an administrator unnecessarily delays the final settlement and distribution of the estate, thereby depriving the distributees of their money, he ought to account for reasonable interest.

In re Danforth's Estate, 66 Mo.App. 586.

⇐479. Credits in general.

Mo. 1876. An administrator should be credited with the amount of a note taken by decedent, the maker of which was insolvent.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1880. In a proceeding by an administrator de bonis non to ascertain the amount of property in the hands of a former administrator, whose letters had been revoked, it appeared that the administrator had paid claims against the estate out of the funds of the estate. *Held*, that the administrator was entitled to interest at the rate of 3 per cent. on the money so paid, with three rests.

Scott v. Crews, 72 Mo. 261.

Mo.App. 1893. Decedent executed a deed of trust on land securing certain notes, which were also signed by sureties. After decedent's death, his administrator procured an order which authorized the sale of the equity of redemption in the mortgaged land. When this sale was made thereafter, the amount due on the notes was allowed by the administrator. *Held* that, as only the equity of redemption in the land was sold, it still stood as security for the estate for the payment of the notes, and the administrator, not having collected the amount of the notes

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from this source, was not entitled to credit on his accounts for their payment.

In re Swan's Estate, 54 Mo.App. 17.

Mo.App. 1940. On final settlement of an estate, probate judge correctly surcharged executor with an overcharge of commissions and properly credited him with an item which had been twice charged to executor.

In re Flynn's Estate, 142 S.W.2d 1069.

⇐480. Decrease of assets.

For cases from other jurisdictions, see other Key Number Digests.

⇐481. Payment of claims.

Mo.App. 1891. Where an administrator was duly authorized to pay a certain sum to the widow for her release of dower, and paid such sum in cash and with his personal note, receiving a proper release therefor, the allowance to the administrator of the amount of this payment to the widow was no fraud on the estate, and persons interested in the estate had no right to complain thereof.

Crowley v. McCrary, 45 Mo.App. 350.

⇐482. Expenses of administration.

Mo. 1904. Charges in an administrator's account for "drafting inventory and appraisement" and for "drafting inventory" cannot be allowed as charges for legal advice and services.

Browning v. Richardson, 85 S.W. 518, 186 Mo. 361.

Mo.App. 1914. In the absence of statutory authority, executors and trustees are not entitled to reimbursement from the estate for money paid as a premium on their fidelity bonds.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

⇐483-484.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐485. Counsel fees and costs.

Mo.App. 1891. Under Rev.St.1879, § 229, V.A.M.S. § 465.100, an administrator is entitled to a reasonable attorney's fee for defending his final settlement.

In re Meeker's Estate, 45 Mo.App. 186.

⇐486. Debts and payments to self.

Mo. 1924. Under Rev.St.1919, § 6493, V.A.M.S. § 408.040, an administratrix, recovering a judgment in her individual capacity against the estate, properly credited herself in her account with interest on such judgment from the date of its rendition.

In re Wenzel's Estate, 263 S.W. 110, affirming In re Wenzel, 243 S.W. 395.

⇐487. Expenses of account.

For cases from other jurisdictions, see other Key Number Digests.

(D) COMPENSATION.

⇐488. Right to compensation in general.

Mo. 1897. Under Rev.St.1889, § 13, V.A.M.S. §§ 461.080, 461.090, requiring the temporary administrator, pending the contest of a will, to "take charge of the property, and administer the same according to law, under the direction of the court," such officer was authorized to take charge of the real estate, the title to which was in controversy, and had the right to collect the rents, and was entitled to the commission allowed by law on the sums collected.

In re Soulard's Estate, 43 S.W. 617, 141 Mo. 642.

Mo. 1922. Executors, or administrators, unlike persons holding official positions with salaries fixed by law, are paid only for services actually rendered. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Rev.St.1919, § 220, V.A.M.S. § 465.100, allowing 5 per cent. commission on disbursements to an "administrator," refers only to the regular administrator, and not to an administrator pendente lite for whose compensation the statute makes no provision, since the commission allowed by that statute is determined on the final distribution which the temporary administrator is not entitled to make. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Mo.App. 1946. Where appointment of public administrator as administrator of deceased's estate was void as not authorized in law, administrator was not entitled to have his fees and expenses allowed. Mo. R.S.A. § 295 et seq., V.A.M.S. § 461.780 et seq.

Donelson's Estate v. Gorman, 192 S.W. 2d 29, 239 Mo.App. 300.

Mo.App. 1947. An administrator is entitled to receive compensation for his services only as prescribed by statute. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mason, 203 S.W.2d 750.

⇐489. Statutory provisions.

Mo. 1942. The statute relating to compensation for services of executors and ad-

ministrators should be construed in interest of estate and to allow commissions only when earned within the statute and on moneys rightfully disbursed. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

⇐489½. Tax on commissions.

For cases from other jurisdictions, see other Key Number Digests.

⇐490. Effect of testamentary provisions.

Mo. 1911. A will directed that executors should take charge of the residue of testator's estate, invest a portion of it in bank stock, and loan out the balance, collect all the accounts, and manage the estate for a period of 10 years from a certain date, and during that time make certain payments to the widow and children. The will also provided that the executors should file a complete inventory, and should make annual accounting to the probate court. *Held*, that testator did not intend that his executors should act in the double capacity of executors and trustees, and, where they acted as executors merely in carrying out the provisions of the will they were not entitled to compensation for services as trustees in addition to their regular compensation as executors.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 60.

Mo. 1936. Will creating testamentary trust and naming same persons as executors and trustees and limiting compensation of trustees to reasonable amount not to exceed 10 per cent. of net income in any one year, but failing to refer to fees of executors, *held* not to limit commission of executors, notwithstanding conjunctive reference to executors and trustees in some parts of will. Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

⇐491. Effect of agreements.

Mo. 1916. Nothing in Rev.St.1909, § 229, V.A.M.S. § 465.100, precludes the beneficiary of an estate and the executor from agreeing upon the "value" of certain items of the estate and fixing a 5 per cent. commission which the executor should receive on his final settlement.

In re Bryan's Estate, 190 S.W. 581.

⇐492. Waiver of right.

Mo. 1936. Before person named in will as executor can be held to have agreed to waive statutory compensation, agreement should appear with reasonable certainty. Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

⇐493. Jurisdiction of courts.

Mo.App. 1890. A will provided that the executor should have the power, when requested by a majority of the legatees, to sell real estate and make distribution. The legatees entered into an agreement for the partition of the real estate, and requested the executor to make conveyances to carry out such agreement. *Held*, that the question of commissions claimed by the executor for services rendered in the execution of the trust was within the jurisdiction of the circuit court, and without that of the probate court, because the power given the executor to sell real estate was not a power conferred upon him as executor, but a distinct and independent personal trust.

In re Rickenbaugh, 42 Mo.App. 328.

⇐494. For what services allowed.

Mo. 1906. Where a son, who is executor under a will, together with the widow and a daughter of testator, resides on a farm belonging to the estate, and during that time they are supported on the products, and the son is manager and chief laborer on the farm, he is not entitled, on an accounting, to a credit for the value of his personal services.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

Mo.App. 1920. In addition to the 5 per cent. commission allowed on disbursements, an administrator pendente lite is entitled to reasonable and proper allowance for his services in collecting and preserving the estate, and the probate court's allowance of such compensation, not shown to be unreasonable, cannot be reversed.

In re Buck's Estate, 220 S.W. 714.

⇐495. Commissions.

⇐495(1). On what charges, credits, or property allowed in general.

Mo. 1851. An administrator is not entitled to commissions upon the assessed value of slaves of the estate, but to a reasonable compensation for hiring them.

Stong v. Wilkison, 14 Mo. 116.

Mo. 1898. Administrators are entitled to commissions on the actual value of assets distributed by them.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

Mo. 1911. Executors were entitled to the statutory commissions on bank stock

owned by decedent and constituting a portion of the assets of his estate, where the executors inventoried such stock, took possession of the same, and collected dividends thereon for several years, and paid such dividends to the devisees of the stock.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo.App. 1889. A special administrator is not entitled to commissions on money and property delivered to his successors in office, and such delivery is neither money paid out nor property fully administered upon, so as to entitle him to statutory commissions.

Boothe's Estate, 38 Mo.App. 456.

Mo.App. 1902. An administrator is only entitled to commissions on disbursements which are finally approved by the court.

Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.

Mo.App. 1908. It being only on amounts collected and paid out that an executor is entitled to commissions under Rev.St.1899, § 223, Ann.St.1906, p. 415, V.A.M.S. § 465.100, he is not entitled to commissions on notes secured by mortgages, they being foreclosed, and the land being bid in and distributed among testator's heirs.

In re Peters, 107 S.W. 406, 128 Mo.App. 666.

Mo.App. 1910. Rev.St.1899, § 223, Ann. St.1906, p. 415, V.A.M.S. § 465.100, provides that in all settlements of executors or administrators the court shall allow all disbursements made by order of the court and as compensation a commission of 5 per cent. on personal property and on money arising from the sale of real estate. Section 224 provides that the executor or administrator shall show that every claim for which disbursements have been made has been allowed by the court. The sole legatees and distributees under the will of a private banker authorized the executor to pay the claims of all depositors, which he did, his first settlement, showing such payment, being approved by the probate court, and admitted by the distributees to be correct. *Held* that, there being no statutory provision confining the commissions to the amount of the estate disbursed on allowed accounts, the executor was entitled to commissions on the amount disbursed, though the claims of the depositors were not presented to the probate court for allowance, the distributees being estopped to claim that the disbursements were unlawful.

In re Purl's Estate, 125 S.W. 849, 147 Mo.App. 105.

Mo.App. 1921. Under Rev.St.1919, § 220, V.A.M.S. § 465.100, providing that executors shall be allowed a commission of 5 per cent. on personal property and on money arising from the sales of real estate, executors were not entitled to commissions on the interest of a pretermitted heir, or on the value of real estate in which the widow was given a life estate, and as to which the executors were not given a power of sale, though under an agreement by the heirs the pretermitted child was allowed to take an equal interest in the real estate, and the widow conveyed the home place by quitclaim deed to the heirs for the purpose of permitting a distribution of the same among the children.

In re Dwyer's Estate, 231 S.W. 672.

A will providing that testator's real estate should be sold by his executors, and the proceeds of the same after payment of debts and legacies to be equally divided between testator's children, and that the executors should use discretion as to when the real estate should be sold, and if such real estate was not sold within five years after testator's death it was to be divided in kind among the children, *held* not to work a conversion of the real estate into personalty, where before the expiration of five years after death of testator the children by an agreement and conveyances among themselves divided the real estate in kind, and such devise did not confer title on the executors, but was a devise directly to the children subject to a discretionary power of sale, and hence the executors were not entitled to commissions on the value of such real estate on the ground that the same was personal property, under Rev.St.1919, § 220, V.A.M.S. § 465.100.

In re Dwyer's Estate, 231 S.W. 672.

Mo.App. 1924. No commission can be allowed executor, under Rev.St.1919, § 220, V.A.M.S. § 465.100, unless moneys on which charged have been, not only collected, but rightfully disbursed to creditors, distributees or legatees, or otherwise paid out in due course of administration.

Vorderstrasse's Estate v. Haumuller, 266 S.W. 1019.

Agreement by all heirs, authorizing executor to make final settlement and distribute personalty among them, without considering advancement to one, which will directed should be paid to estate, *held* not to authorize executor to charge commission on amount of such advancement.

Vorderstrasse's Estate v. Haumuller, 266 S.W. 1019.

Clause of will directing repayment of amount advanced to one heir to estate *held* not to require its return in specie, but only that it be brought into hotchpot and accounted for as condition of such heir's sharing in

distribution of estate, so that executor was not entitled to commission thereon.

Vorderstrasse's Estate v. Haumuller, 266 S.W. 1019.

Mo.App. 1938. Where notes of testator's son represented advancements, they did not become a part of the testator's estate, and commissions were not allowable on them to the executor. Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

Hanssen v. Karbe, 115 S.W.2d 109, 234 Mo.App. 663, transferred 106 S.W.2d 415.

⇐495 (2). Acting in different capacities.

Mo. 1917. The rule that one as testamentary trustee and executor cannot recover double compensation does not apply to one who was trustee in his individual capacity for six years before he became executor.

Johnston v. Grice, 199 S.W. 409, 272 Mo. 423.

Mo. 1933. Compensation allowed to one acting in dual capacity as executor and trustee under will will be that of executor, and is allowed in executor's settlement. Mo.St. Ann. § 221, p. 142, V.A.M.S. § 465.100.

Estey v. Commerce Trust Co., 64 S.W.2d 608, 333 Mo. 977.

Mo. 1936. Property which was not consumed by payment of debts and expenses, but was turned over by executors to themselves as trustees of trust created by will, *held* "disbursed" within statute allowing commission on total property "disbursed," though part thereof was turned over without having been reduced to cash. Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

⇐495 (3). On real property and rents thereof.

Mo.App. 1916. Where beneficiaries effect reconversion by electing to take land instead of proceeds, executor who was directed to sell the property is entitled to his statutory commission.

Gilbreath v. Cosgrove, 185 S.W. 1181, 193 Mo.App. 419.

The executor, who was to sell the land, will not be denied commissions because it was not valued in money; the court having the power to value the land for purpose of assessing commission.

Gilbreath v. Cosgrove, 185 S.W. 1181, 193 Mo.App. 419.

Mo.App. 1942. Where executor with approval of probate court purchased real estate at foreclosure sale under trust deed thereon given to secure repayment of notes belonging to testator's estate and received money from the rents on such real estate or from other sources sufficient to pay all debts so that such real estate was not sold, executor was not entitled as part of his compensation to a commission on the value of such real estate. Mo.R.S.A. §§ 95, 93, 220, V.A.M.S. §§ 462.240, 462.250, 465.100.

In re Cohn's Estate, 163 S.W.2d 802, 237 Mo.App. 234.

⇐495 (4). On property not assets of estate.

For cases from other jurisdictions, see other Key Number Digests.

⇐495 (5). On proceeds of sale of assets.

Mo. 1891. Certain contracts, made by brokers for the sale of stock to a decedent, constituted a part of the assets of the decedent's estate. Plaintiff, as administrator, applied for the sale of such stock, and thereupon the brokers sold it, and from the proceeds deducted the balance of the purchase price of the stock, and delivered the remainder to plaintiff. *Held*, that under Rev. St.1879, § 229, V.A.M.S. § 465.100, which allows administrators a commission of 5 per cent. on sales of personal property, plaintiff could only claim commission on the amount left after paying the balance due on the purchase price of the stock.

Hitchcock v. Mosher, 17 S.W. 638, 106 Mo. 578.

The brokers were not beneficiaries of the trust fund held by the administrator, and he had no authority to make a disbursement to them out of such fund, and could not charge himself with the gross amount of the sale of said stock, and credit himself with the balance of the purchase price paid and obtain a commission thereon.

Hitchcock v. Mosher, 17 S.W. 638, 106 Mo. 578.

Mo. 1918. Where corn belonging to testator was sold by the executors, and proceeds paid on a mortgage debt of testator, the executors, under Rev.St.1899, § 223, Rev.St. 1909, § 229, V.A.M.S. § 465.100, were entitled to commission of 5 per cent. on such sum.

Roloson v. Riggs, 203 S.W. 973, 274 Mo. 522.

Mo.App. 1888. Distributees of the estate of a decedent cannot object to the administrator's retention of commissions on the proceeds of the sale of real estate on the ground that the sales were void, since, if the sales were void, the probate court had no authority to direct to whom the administrator should pay it, or who should have it.

Crenshaw v. Bentley, 31 Mo.App. 75.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1898. The 5 per cent. commission allowed administrators under Rev.St. 1889, § 222, on personal property and money arising from sale of real estate, is not earned until the sum on which it is claimed has been rightfully paid out in the due course of administration to creditors or distributees of the estate.

Garrison v. St. Louis Trust Co., 77 Mo. App. 333.

Mo.App. 1901. An administrator is not entitled to commission on the homestead portion of a surplus allowed to minor children, arising from a sale of the decedent's real estate under a deed of trust executed by the latter in his lifetime.

Elstroth v. Young, 88 Mo.App. 418.

Mo.App. 1910. Where an executor, though authorized to sell land for the payment of debts or distribution, sold some of the land and paid all the debts except a mortgage lien, and then induced a division of the balance among the legatees, he was not entitled to commissions on the value of the land so divided, under Rev.St.1899, § 223, Ann.St.1906, p. 415, V.A.M.S. § 465.100, providing that an executor shall be allowed a commission of 5 per cent. on personal property and on money arising from the sale of real estate.

O'Bannon's Estate v. O'Bannon, 126 S. W. 215, 142 Mo.App. 268.

⇐495(6). On legacies and distributive shares.

Mo.App. 1920. An administrator was not entitled under Rev.St.1909, § 229, V.A.M.S. § 465.100, to a commission for distributing a share of an estate under order of the probate court, where the distributee refused to accept it, although such share was set aside under instructions of the probate court and deposited in a place of safekeeping, and was, subsequent to the death of the administrator, accepted by the distributee.

Peper v. Bell, 218 S.W. 438, record of Court of Appeals quashed State ex rel. Peper v. Reynolds, 226 S.W. 550. Opinion of Supreme Court conformed to Peper v. Bell, 229 S.W. 1111.

⇐495(7). Investments and continuance of decedent's business.

For cases from other jurisdictions, see other Key Number Digests.

⇐496. Amount and computation of compensation.

⇐496(1). In general.

Mo.App. 1924. Evidence *held* to sustain an allowance for 10 days' services at the rate provided by Rev.St.1919, § 574, V.A.M.S. § 145.190, in appraising a decedent estate for purpose of assessing the inheritance tax, where the estate's market value for distribution was $36,568.50, trial court's finding of allowance for 24 days not being sustained.

In re Baptiste's Estate, 259 S.W. 498.

⇐496(2). Commissions.

Mo. 1896. In determining an administrator's commissions on a sale of corporate stock the market value of the stock as well as of any other commodity, is the price at which it commonly sells.

Moffit v. Hereford, 34 S.W. 252, 132 Mo. 513.

Mo. 1904. Rev.St.1899, § 291, V.A.M.S. § 461.810, provides that a public administrator shall receive the same compensation for his services as may be allowed by law to executors and administrators, unless the court, for special reasons, allows a higher compensation. Section 57 provides that, in the case of partnership estates administered by the executor or administrator of the individual estate of a deceased partner, such executor or administrator is required to keep the partnership estate separate and distinct, and to account and report in all respects therefor as a separate estate. Sections 61–67 require the administrator of the partnership estate to give bond, in addition to the bond given by him as executor or administrator of the individual estate, in a sum at least double the value of the whole copartnership estate, and to administer the same in conformity to administrations in ordinary cases, and to perform the same functions and duties, be governed by the provisions, and be subject to the same penalties, liabilities, and actions, as other administrators and their sureties. Section 223 provides that in all settlements of executors or administrators the court shall allow as full compensation for their services a commission of 5 per cent. on personal property and on the money arising from the sale of real estate, and that surviving partners, in administering, shall be allowed a commission of 3 per cent. on the deceased partner's interest for like services and trouble. *Held*, that under these sections a public administrator is entitled to a commission of 5 per cent. on the assets of partnership estates coming into his hands.

Browning v. Richardson, 85 S.W. 518, 186 Mo. 361.

Mo. 1933. Executor's fee is 5 per cent. of amount passing through executor's hands and disbursed to creditors, distributees, or legatees, or otherwise paid out in course of administration Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

Estey v. Commerce Trust Co., 64 S.W.2d 608, 333 Mo. 977.

For references to other topics, see Descriptive-Word Index

Mo. 1942. The allowance of $2,972.95 for commissions, calculated upon $59,459 disbursed in an estate having $23,101.57 in assets, in view of administrator's continuation of deceased's business, was not warranted and should be reduced to $1,155.07. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1902. The public administrator is entitled to 5 per cent. for distributing to creditors proceeds of sale of land made by order of the probate court, under Rev.St.1899, c. 1, art. 8, V.A.M.S. § 463.140 et seq., relative to administration.

Elsroth v. Young, 68 S.W. 100, 94 Mo. App. 351.

On an order in the circuit court for distribution of a fund by the public administrator, it was proper to allow him 5 per cent. on a sum paid on a previous distribution in the probate court.

Elsroth v. Young, 68 S.W. 100, 94 Mo. App. 351.

Mo.App. 1930. Stranger to partnership, acting as administrator, is entitled to 5 per cent. commission on disbursements. Rev.St. 1919, § 220, V.A.M.S. § 465.100.

In re Harr & Harr's Estate, 22 S.W.2d 209, 224 Mo.App. 6.

Mo.App. 1942. The commission on personal property and on money arising from the sale of real estate provided by statute as full compensation for services of executors and administrators is the compensation which an executor or administrator is to receive whether he earns that amount, a less amount, or more. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Cohn's Estate, 163 S.W.2d 802, 237 Mo.App. 234.

Mo.App. 1943. If administrator chooses to forego his own statutory commission by paying his commission to an agent for selling the estate real estate, the commission so paid cannot exceed the five per cent. allowed administrator on money arising from the sale. Mo.R.S.A. § 141, V.A.M.S. § 463.170.

In re Claus' Estate, 167 S.W.2d 372.

⇐496 (3). Allowance of gross sum.

For cases from other jurisdictions, see other Key Number Digests.

⇐497. Extra allowances.

Mo. 1875. An executor cannot charge more than his statutory remuneration for services in investing funds for the heirs and acting as their attorney and agent.

Gamble v. Gibson, 59 Mo. 585.

Mo. 1876. In the absence of a showing of the necessity therefor, an administrator should not be granted an allowance for looking after the real estate of the estate.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1886. An administrator who has received the 5 per cent. commission allowed by Rev.St.Mo.1879, § 229, V.A.M.S. § 465.100, being "as full compensation for services and trouble," is not entitled to a credit for services in collecting rents, the collections having been made by a clerk who drew a salary from the estate.

Scudder v. Ames, 14 S.W. 525, 89 Mo. 496.

Mo. 1887. An executor who has been allowed the regular commissions, and a fair compensation for leasing property of the estate and similar work, is not entitled to a per diem for general services.

Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo. 1918. Although executors acted faithfully and did much work in collecting, by suit, over $45,000 of life insurance, without which the estate would have been insolvent, they were not entitled, in addition to commissions and allowance for expenses and amounts paid attorneys, to extra compensation for services in collecting the insurance, in view of Rev.St.1909, § 229, Rev.St.1899, § 223, V.A.M.S. § 465.100, providing for commission.

Roloson v. Riggs, 203 S.W. 973, 274 Mo. 522.

⇐498. Coexecutors and coadministrators.

Mo. 1842. Where an allowance of a gross sum is made by the county court to executors or administrators as compensation for their services, it must be equally divided, and one cannot retain the whole on the ground that the other has rendered no service.

Smart v. Fisher, 7 Mo. 580.

Mo. 1920. An agreement between executors apportioning commissions so as to give the bulk of them to the executor transacting the greater part of the business, was legal and binding, even though not amounting to a gift.

Guthrie v. Crews, 229 S.W. 182, 286 Mo. 438.

Mo.App. 1878. Though, under Wag.St. p. 108, § 9, fixing the compensation of executors at a commission of 5 per cent., the court has no authority to apportion the commission between two executors according to the amount of service rendered by each, yet it is not error, in making the allowance, to direct one-half of the commission to be paid to each executor.

In re Seitz's Estate, 6 Mo.App. 250.

For later cases see same Topic and Key Number in Pocket Parts

Under Wag.St. p. 108, § 9, providing that in all settlements of executors or administrators the court shall allow all disbursements and reasonable charges, and as full compensation a commission of 5 per cent. on personal estate and money, the court has no power to apportion the executors' commissions between them in proportion to the amount of labor which each has performed.

In re Seitz's Estate, 6 Mo.App. 250.

Mo.App. 1880. In regard to the matter of commissions, it is immaterial which of the executors actually attended to the business, since each is under the statute entitled to one-half of the legal commission, and the refusal of the executrix to charge any commission cannot prejudice the rights of her co-executor, where she seems throughout to have put herself in a position of antagonism to him, and the evidence tends to show that he acted fairly and with good intentions.

Schoeneich v. Reed, 8 Mo.App. 356.

⇐499. Successive administrations.

Mo. 1922. The claim of a temporary administrator for compensation should be first presented to the probate court for consideration and allowance. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Where one person serves as an administrator for part of the time and another completes the administration of the estate, the first administrator should be paid the 5 per cent. commission only on sums disbursed by him. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

Even though the probate court wrongfully paid to an executor compensation which should have been allowed to the temporary administrator, the temporary administrator's claim is against the estate, and he has no cause of action against the executor personally. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

The remedy of a temporary administrator for the executor's refusal to turn the assets over to him is by suit to recover the assets or by citation of the executor in the probate court, and, if he failed to pursue either remedy and was prevented from rendering any services by the refusal of the executor to turn the assets over to him, he is not thereby entitled to recover from the executor the commissions received by the latter as money received to the administrator's use. Per Graves, Walker, and Higbee, JJ.

Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561.

⇐500. Forfeiture or deprivation of compensation.

Mo. 1881. An executor who has converted the assets of the estate is not entitled to commissions.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo. 1898. An executor is entitled to no commissions on the value of corporate stock, into which he had illegally converted testator's land.

Garesche v. Levering Inv. Co., 48 S.W. 653, 146 Mo. 436, 46 L.R.A. 232.

Mo. 1920. Where an administrator, under Rev.St.1909, § 229, V.A.M.S. § 465.100, was allowed commission of 5 per cent. on personal property, the distributee could not defeat his right thereto by arbitrarily refusing to receive the distribution ordered.

State ex rel. Peper v. Reynolds, 226 S.W. 550, 286 Mo. 126, quashing record of Court of Appeals Peper v. Bell, 218 S. W. 438, 286 Mo. 126, opinion of Supreme Court conformed to Peper v. Bell, 229 S.W. 1111.

Mo. 1942. Compensation may be refused to an executor or administrator for mismanagement, conversion, failure to file inventories and accounts. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1905. Where an administrator was guilty of maladministration of the estate, and had paid claims which had not been proved, etc., he thereby forfeited all claim to commissions.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 87 S.W. 7, 112 Mo.App. 585.

Mo.App. 1911. The administrator is not deprived of his right to compensation by assuming the attitude of a creditor of the estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

Mo.App. 1930. Administrator acting in good faith under void letters *held* not entitled to statutory commission on final settlement.

Stinson v. Farris, 28 S.W.2d 378, 224 Mo.App. 492.

Administrator acting under void letters in good faith *held* entitled to compensation for services resulting in benefit to estate which estate would not otherwise have received.

Stinson v. Farris, 28 S.W.2d 378, 224 Mo.App. 492.

Administrator acting under void appointment, who merely collected balance due on decedent's war risk insurance policy from

government, *held* not entitled to compensation.

Stinson v. Farris, 28 S.W.2d 378, 224 Mo.App. 492.

⇐501. Proceedings and order for allowance.

Mo. 1845. An allowance made to an administrator may be vacated at any time during the term at which it was made, but only on notice to the administrator; and an order vacating such allowance without notice is void.

Caldwell v. Lockridge, 9 Mo. 362.

Mo. 1878. On an issue as to the amount to be allowed an administrator pendente lite, evidence as to the amount allowed by the court in another case was incompetent.

Hawkins v. Cunningham, 67 Mo. 415.

Mo. 1891. The executor of an estate claimed credit for commissions on the value of certain stock at the rate of $388 per share. From evidence of the value of the stock before and after it was turned over by the executor to the distributees under the will, the probate court and the circuit court determined that $300 per share was a fair estimate of the value of the property to the estate at the time it was turned over by the executor. *Held*, that their judgment should not be disturbed on appeal.

Glover v. Holliday, 18 S.W. 1133, 109 Mo. 108.

Mo. 1898. Allowance of proper commissions to administrators may be made at any time by any court before which their accounts are drawn in question.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

Mo. 1911. On settlement of executors' accounts, *held*, under the evidence, that it was not error for the circuit court on appeal from the probate court not to charge the executors with 8 per cent., the largest rate allowable, instead of 7½ per cent. on moneys remaining in their hands after each annual settlement, and not loaned down to the date of the next settlement, where there was no evidence that the executors mingled the funds of the estate with their own or ever used any of them in their private business, or for any other profit, or ever lost or embezzled any portion of the estate, or were ever guilty of any intentional breach of trust regarding the estate.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

On appeal to the circuit court from an order of the probate court approving the final accounting by executors, evidence *held* sufficient to warrant a finding of the circuit court against the contention that the executors by reason of mismanagement should be deprived of compensation.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo.App. 1920. Allowance to an administrator on an annual settlement of credits for commissions is not a final adjudication as to the right of the administrator to such credits, and such an allowance is carried over and can be excepted to on final settlement.

Peper v. Bell, 216 S.W. 438, record of Court of Appeals quashed State ex rel. Peper v. Reynolds, 226 S.W. 550, opinion of Supreme Court conformed to Peper v. Bell, 220 S.W. 1111.

Mo.App. 1940. The amount of an executor's commission could not be determined until determination of credits which could be allowed the executor on final settlement. Mo.St.Ann. § 221, p. 142, V.A.M.S. § 465.100.

In re Flynn's Estate, 142 S.W.2d 1069.

(E) STATING, SETTLING, OPENING, AND REVIEW.

⇐502. Form and requisites of account.

Mo. 1876. Expense incurred by an administrator before his appointment for the benefit of the decedent should not be allowed, where the items thereof are not set forth.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1883. The filing of an account cannot of itself, without any action thereon by the court, constitute a settlement.

Morehouse v. Ware, 78 Mo. 100.

Mo. 1943. The accounting required under statutes dealing with settlements after revocation of personal representatives' letters and requiring such retiring representative to account for all assets of the estate, etc., calls for a disclosure of assets received and paid out and of the balance on hand, but does not require the retiring representative to report third-party claims which have not been asserted or liquidated and upon which nothing has been paid, merely because he knows about them. Mo.R.S.A. §§ 48, 49, V.A.M.S. §§ 461.550, 461.560.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

The assertion of unsatisfied third-party claims which have not been asserted or liquidated, in a settlement by a retiring personal representative, would be "premature". Mo. R.S.A. §§ 48, 49, V.A.M.S. §§ 461.550, 461.560.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo.App. 1920. The account of an administrator pendente lite on revocation of his

letters should show of what items the balance in his hands consists.

In re Buck's Estate, 220 S.W. 714.

⇐503. Vouchers and proof of payment.

Mo. 1889. Rev.St. § 230, V.A.M.S. § 465.090, provides that upon every settlement the executor shall show that every claim for which disbursements have been made has been allowed by the court according to law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law. *Held* that, upon the production of the latter proof, credit will be allowed for the disbursements, though the voucher for such credit was not allowed as a demand against the estate.

Jacobs v. Jacobs, 12 S.W. 457, 99 Mo. 427.

Mo.App. 1945. Guardians, administrators, executors, trustees, and persons who act in a fiduciary capacity, in general, are required to account for money received and disbursed and to furnish proper vouchers for each expenditure or other kind of evidence which will meet reasonable requirement of court whence they derive their authority. Mo.R.S.A. § 491, V.A.M.S. § 458.610.

In re Mansour's Estate, 185 S.W.2d 360, 238 Mo.App. 623.

⇐504. Objections and exceptions.

⇐504 (1). In general.

Mo.App. 1890. Heirs and distributees of an estate, objecting to items of credit in the administrator's final account, are not creditors proceeding under Rev.St.1889, §§ 282–285, V.A.M.S. §§ 461.290, 465.270, 467.010, 481.100 note.

McClelland v. McClelland, 42 Mo.App. 32.

Mo.App. 1898. After an administrator made a sale of land, it was discovered that two minor children had a homestead right in the land, whereon the administrator, the guardian of the minors, and the purchaser agreed on the value of such homestead right, and that the purchaser should pay this amount to the guardian for the wards in full satisfaction of their interest in the land, and that the administrator should receive the balance of the purchase price as the full amount due the estate. *Held* that, if the order of the probate court approving such adjustment was coram non judice, that fact could not avail heirs of the decedent, who were excepting to the final report of the administrator; for, if such sale was illegal, the exceptors were not entitled to insist on the administrator being charged with any portion of the bid.

Hesche's Estate v. Schnecko, 73 Mo.App. 612.

Mo.App. 1900. Rev.St.1889, § 275, V.A.M.S. § 465.200, authorizing creditors to object to the final settlement of an administrator if he has not made just account of the assets in his hands, does not apply to a case of objection of the administrator's conduct, where he fails to inventory a debt due from him to the estate in the bona fide belief that no such debt exists, when such objection is made by a distributee.

Wilson v. Ruthrauff, 82 Mo.App. 435.

Mo.App. 1911. An objection to the final settlement of an administrator of his mother, which involves his acts as executor of his stepfather, based on his failure to account for his acts as executor of his stepfather, made by the heirs and legatees of the mother after the final settlement of the estate of the stepfather after the death of the mother, cannot be entertained by the court, but the remedy of the heirs is to proceed under Rev.St.1899, §§ 74–78 (Ann.St.1906, pp. 362–364), now Rev. St.1909, §§ 70–74, V.A.M.S. §§ 462.400 to 462.440, authorizing proceedings against executors and administrators to discover assets, or to resist the final settlement of the stepfather's estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

Mo.App. 1945. The filing of specific written exceptions to executrix' interim and final settlements had effect of setting aside probate court's order approving final settlement, suspending operation of such settlement and keeping testatrix' estate open, so that continuance of exceptions to later term of probate court carried over to such term question of approval or disapproval of final settlement and either party could appeal to circuit court from order disposing of exceptions at such term. Mo.R.S.A. §§ 283, 285, V.A.M.S. §§ 467.010, 467.030.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐504(2). Persons entitled to object.

Mo. 1904. On exceptions to the accounts of a public administrator in three different estates where it appeared that the exceptors were the sole beneficiaries in the same proportion as to two of the estates, there was no prejudicial error in overruling the exceptions to the accounts merely because credits entered in favor of one of the estates in which the exceptors were interested would more properly have appeared in the settlement of the other estate, in which the exceptors were interested; the result to the exceptors being the same whether the credits were taken in the settlement of one or the other of the estates.

Browning v. Richardson, 85 S.W. 518, 186 Mo. 361.

For references to other topics, see Descriptive-Word Index

Mo. 1933. Life beneficiary, if desiring to object to payment of inheritance taxes by executors should file exceptions to final settlement of executors in probate court, and testamentary trustees were not required to do so for beneficiary.

Selleck v. Hawley, 56 S.W.2d 387, 331 Mo. 1038.

Mo. 1937. Where executor or administrator acts without bond, party injured by waste or mismanagement of estate may file exceptions in probate court, with right of appeal to losing party. Mo.St.Ann. § 18, p. 18; § 19, p. 19; §§ 282, 279, p. 175, V.A.M.S. §§ 461.260, 461.270, 461.290, 465.250.

Smith v. St. Louis Union Trust Co., 104 S.W.2d 341, 340 Mo. 979.

Mo.App. 1879. Where an executor is also trustee under a will, a cestui que trust may maintain proceedings to surcharge the executor's accounts. See,

James v. Withinton, 7 Mo.App. 575, memorandum.

Mo.App. 1906. Under Rev.St.1899, § 268, V.A.M.S. §§ 465.200, 465.230 et seq., providing that a creditor of a decedent may in case of deficiency of assets to pay debts, suggest that the administrator has not made a just account, a creditor of a decedent may file exemptions to the administrator's settlement, and appear and be heard thereon, and appeal from a judgment of the probate court, if aggrieved thereby.

Taylor v. Bader, 98 S.W. 80, 117 Mo. App. 72.

Mo.App. 1934. Purchaser of interest of heirs in deceased's personal estate *held* entitled to file exceptions to administrator's settlements.

Jones v. Redman, 75 S.W.2d 80.

⇐504(3). Time for making or filing.

Mo. 1953. Time and opportunity is afforded all interested persons to contest correctness of final settlement of a decedent's estate, with right of appeal, and approval by probate court of final settlement of administration constitutes final judgment, conclusive on all matters included or necessarily involved in the settlement.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

Mo.App. 1902. Distributees of an estate cannot question items of credit claimed by the administrator until final settlement.

In re Hutton's Estate, 92 Mo.App. 132.

⇐504 (4). Bar, estoppel, and waiver.

Mo. 1876. A private settlement of an administrator with the heirs will not preclude the opening and surcharging of the annual settlements at the final settlement.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo.App. 1878. Where the widow, who was also life tenant and executrix, was for quite a while permitted without objection by the remaindermen to appropriate to her own use certain funds, with full knowledge of the facts and that she in good faith believed them to belong to her, they will not be permitted to contest her right subsequently.

Payne v. Payne, 5 Mo.App. 188.

⇐504(5). Form and sufficiency.

Mo. 1936. Exception to administrators' first and final settlements as not being in proper form and not being just and true accounts *held* a generality presenting no specific objection.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo. 1942. The practice is for interested persons to file written exceptions to objectionable items of final settlement in probate court, notwithstanding that specific statutory sanction for such practice may not exist.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Exceptions that settlements of administrators are not in proper form and are not just and true accounts are a generality presenting no specific objections.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1906. In proceedings for the settlement of the account of the administrator of a decedent, a creditor of the decedent filed a suggestion that the administrator had allowed against the estate a demand for $722, that $288 had been paid thereon, and that the administrator's settlement showed a balance of $60.50, due from him to the estate. *Held*, that the creditor sufficiently showed that the assets of the estate were insufficient to pay the debts, authorizing the court to hear his exceptions to the settlement.

Taylor v. Bader, 98 S.W. 80, 117 Mo. App. 72.

Mo.App. 1943. Exceptions to settlement of executors which merely charge generally that settlements are not in proper form and are not just and true accounts present no specific objection and cannot be considered.

Clow's Estate v. Clow, 167 S.W.2d 903, 237 Mo.App. 267.

Mo.App. 1945. The proper manner to direct probate court's attention to alleged improper credits or charges in executrix' in-

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terim and final settlements was by filing specific written exceptions to such settlements.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⚖504 (6). Questions subject to determination on objections or exceptions.

Mo. 1876. On final settlement by the executor of a son, the final account of the estate of the father by the same executor will not be inquired into.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1898. Matters with respect to which judgments had been entered by courts of competent jurisdiction, which judgments had been certified to the probate court, and classified by it, and paid by the administrators, cannot be inquired into on exceptions to final settlement of the administrators; being res judicata.

Ladd v. Stephens, 48 S.W. 915, 147 Mo. 319.

Mo. 1904. The right of a public administrator to take charge of an estate cannot be raised under exceptions which go only to the proper settlement of his administration.

Browning v. Richardson, 85 S.W. 518, 186 Mo. 361.

⚖504(7). Proceedings and order on objections or exceptions.

Mo.1942. The filing of exceptions to objectionable items of final settlement of administrator in probate court sets aside order approving final settlement, suspends operation of settlement and keeps the estate open.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

An executor or administrator is entitled to a decision of probate court on objections to his settlements, and the privilege of abiding by adverse determinations if he so chooses.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1897. Under Const. art. 6, § 34, V.A.M.S. and Rev.St.1889, § 3397, V.A.M.S. § 481.020, conferring on the probate court jurisdiction over all matters pertaining to the settling of the accounts of executors and administrators, the probate court, on a final settlement of an executor, has jurisdiction to determine an exception to the report which alleges that the executor sold real estate belonging to the estate at a less sum than was offered therefor, causing a loss to the estate, even though the heirs have a remedy on his bond, under Rev.St.1889, § 283.

Johnson v. Johnson, 72 Mo.App. 386.

Mo.App. 1943. Where executrix and her sister who were two of the three main beneficiaries of testator's will continued to live on testator's farm after testator's death without order of probate court, and conducted the farm the same as if testator had not died, and paid expenses out of the estate money, the trial court properly sustained exceptions to claimed credits of executrix, for labor, seed, feed, etc., in connection with operation of farm.

Clow's Estate v. Clow, 167 S.W.2d 903, 237 Mo.App. 267.

⚖505. Examination of executor or administrator.

For cases from other jurisdictions, see other Key Number Digests.

⚖506. Evidence.

⚖506 (1). Presumptions and burden of proof.

An executor must use all reasonable diligence in collecting the assets of the estate, and the burden is on him to show that a debt due the estate could not have been collected by the exercise of proper diligence.

Mo. 1876. Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1881. Julian v. Abbott, 73 Mo. 580.

Mo. 1887. Booker v. Armstrong, 4 S.W. 727, 93 Mo. 49.

Mo.App. 1904. Hallway v. Eckler, 80 S.W. 46, 105 Mo.App. 585.

Mo. 1837. Where the widow of an intestate made certain payments to a distributee, the presumption is that the payments were out of the individual property of the widow, and not as administratrix of her husband's estate.

Banks v. McCarty, 5 Mo. 1.

Mo. 1889. Where deceased and M., who were partners in trade, executed three notes at about the same time, one in the firm name, and the other two in their individual names, it will be presumed that the two last-mentioned notes were given for joint debts; and the administrators, having paid them in full, must show, on a settlement after M. became insolvent, either that they made all reasonable efforts to enforce contribution from M., or that there was no liability from M. to the estate.

Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo.App. 1917. Where administrator sued on notes and was being sued for malicious prosecution by maker, and took judgment for less than face value of notes in settlement of the several suits, burden *held* on one objecting to allowance of credit for balance in his final account to show bad faith

on his part in taking such judgment and that injury resulted to estate.

Young v. Ray, 193 S.W. 608.

⇐506(2). Admissibility.

Mo.App. 1945. In administrator's final accounting proceeding, involving issues of undue influence and mental capacity of deceased to execute receipt acknowledging full payment, by services rendered, of notes against attorney subsequently appointed administrator, excluding testimony as to statements made by deceased that she did not "trust" attorney with everything was not error, where it was apparent that deceased was using the word "trust" as equivalent to the word "entrust" and intended to convey idea that scope of employment did not extend to all property.

In re Nelson's Estate, 185 S.W.2d 890.

⇐506(3). Weight and sufficiency.

Mo. 1870. Where an executor undertakes to discharge himself from responsibility for the funds in his hands on the ground that such funds have been stolen from him, the fact of the loss in the manner asserted should be made to appear as clearly as the case admits.

Foster v. Davis, 46 Mo. 268.

Mo. 1916. On settlement of deceased executor's account by his executors, evidence, including letters between deceased executor and principal beneficiary, *held* to show their agreement that executor, when making and filing his final settlement, should receive a 5 per cent. commission, amounting to $19,509.88.

In re Bryan's Estate, 190 S.W. 581.

Mo. 1926. Evidence *held* to sustain judgment sustaining exceptions by guardian for insane person to final settlement of estate of deceased who had been such guardian.

In re Hamill's Estate, 287 S.W. 485, 315 Mo. 972.

Mo.App. 1907. On the issue whether an executrix, directed by the will to sell testator's land as soon as the same could be done without sacrifice, exercised the proper degree of diligence in selling the land, evidence *held* insufficient to charge her with improper management in making a sale on the ground that a better price could have been obtained.

In re Branch's Estate, 100 S.W. 516, 123 Mo.App. 573.

Mo.App. 1917. On appeal from final account of administrator, evidence *held* to show that administrator who had sued on notes and was being sued by maker for malicious prosecution acted wisely in taking judgment for less than face value of notes.

Young v. Ray, 193 S.W. 608.

Mo.App. 1927. Evidence *held* not to show extraordinary services rendered by public administrator's attorney, entitling him to more than statutory fee.

Gump's Estate v. Jacobs, 292 S.W. 81, 222 Mo.App. 545.

Mo.App. 1941. Except in the case of items for which charges were fixed by statute, the mere fact of the presence of receipts for all disbursements for which administrator claimed credit in his annual report would not establish the reasonableness of the charges so as to warrant allowance of the claimed credit.

In re Claus' Estate, 147 S.W.2d 199.

Mo.App. 1945. Evidence established that a woman 88 years of age, although suffering from arteriosclerosis which had advanced to the state where she had senile dementia, was mentally competent to understand the nature of her act in executing a receipt which acknowledged that notes held by her against an attorney, subsequently appointed administrator of her estate, had been fully paid by services rendered, that no fraud or duress was practiced in securing receipt, and that notes were so paid, although in deceased's possession at her death.

In re Nelson's Estate, 185 S.W.2d 890.

Mo.App. 1948. Evidence was sufficient to justify finding that executor did not sign, authorize, or adopt notice of publication of final settlement. Mo.R.S.A. §§ 229, 230, V.A.M.S. §§ 465.160, 465.170.

In re McArthur's Estate, 207 S.W.2d 546, 240 Mo.App. 435.

⇐507. Hearing or reference.

⇐507(1). Scope of inquiry by court.

Mo. 1929. Only question for determination was amount of interest which trust company executor should be required to pay on estate funds. Rev.St.1919, §§ 222, 223, 11801, subd. 9, V.A.M.S. §§ 363.200, 462.270, 465.080.

Enright v. Sedalia Trust Co., 20 S.W. 2d 517, 323 Mo. 1043.

Mo. 1936. Charges against estate arising in course of administration, such as expenses of administration, collection and preservation of estate, and legal services, may be determined and allowed by probate court on final settlement without prior formal allowance thereof. Mo.St.Ann. § 222, p. 145, V.A.M.S. § 465.090.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo.App. 1896. The administration and settlement of an estate in the probate court is analogous to a proceeding to take an account before a master in chancery, and, where objections or exceptions to such a set-

tlement are filed, the proceedings thereon are essentially equitable, and must be tried and reviewed as such.

In re Danforth's Estate, 66 Mo.App. 586.

⇐507(2). Hearing by court in general.

Mo.App. 1940. In final settlement of an estate, an account must be taken by probate court of errors found to exist in any of prior partial settlements, and judge should make debit or credit accordingly for any such error called to his attention, whether exceptions are filed or not.

In re Flynn's Estate, 142 S.W.2d 1069.

⇐507 (3). Submission of issues to jury.

Mo.App. 1900. A distributee cannot claim the right to adjudicate a right to property claimed to be an asset, and the question of an administrator's indebtedness to the intestate at the final hearing, since the administrator is entitled to a jury trial, and the statutes do not provide that his rights are to be determined in a summary manner.

Wilson v. Ruthrauff, 82 Mo.App. 435.

⇐507 (4). Reference.

For cases from other jurisdictions, see other Key Number Digests.

⇐508. Order or decree.

⇐508(1). In general.

Mo. 1924. Probate court erred in approving final settlement before estate was finally administered.

In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

Mo. 1927. Order directing administrator to distribute balance on hand "to parties entitled thereto" *held* void, being either meaningless, or attempt to invest him with judicial discretion.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1882. On an annual settlement, an order of the administrator to pay dividends should not be so made as to exhaust the fund in the administrator's hands, but a margin should be left for later expenses of administration and for other contingencies.

Peters v. Clendenin, 12 Mo.App. 521.

Mo.App. 1948. Where executor did not sign notice of final settlement, probate judge had notice of final settlement published as was his custom, executor's attorney, in anticipation of final settlement being made, prepared such a settlement but executor refused to sign and verify it and insisted that it be changed from a final to an annual settlement and that there be attached to it a written claim that he, as an individual, had a just demand against the estate and after such changes were made he signed and verified it as an annual settlement, probate court improperly approved the settlement as a final settlement and ordered distribution. Mo.R.S.A. §§ 216–219, 229, 230, V.A.M.S. §§ 465.040–465.070, 465.160, 465.170.

In re McArthur's Estate, 207 S.W.2d 546, 240 Mo.App. 435.

⇐508(2). Construction and operation.

Mo.App. 1880. An adjudication of the probate court on the final settlement of an executor, declaring the balance due from him on the estate, and making an order of final distribution, is a judgment, within the meaning of Wag.St. p. 709, § 2, providing that judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered, situated in the county for which the court is held.

Haeussler v. Scheitlin, 9 Mo.App. 303.

Mo.App. 1912. A judgment of the probate court rendered on notice by the administrator of his intention to make a settlement of the estate, which recites that the accounts of the administrator are correct, and which approves the same, and which declares that the allowed claims have been paid in full, and that the balance on final settlement has been distributed in conformity to the order of the court, and that the administrator has accounted for the assets that have come into his hands, and that the estate has been administered, and which orders the discharge of the administrator, is a final judgment.

Lile v. Kincaid, 142 S.W. 434, 160 Mo. App. 297.

⇐508 (3). Enforcement.

For cases from other jurisdictions, see other Key Number Digests.

⇐509. Opening or vacating.

⇐509(1). Nature and scope of remedy.

Mo. 1899. A judgment of the probate court, finally settling and distributing the estate, and discharging the executor, without objection, from a specific legatee, is a final judgment, which, after the term at which it was entered, can be set aside only by direct proceedings in equity, on the ground of fraud, and with the parties brought into court by summons, and not by mere notice.

Smith v. Hauger, 51 S.W. 1052, 150 Mo. 437.

Mo.App. 1886. Rev.St. § 282, V.A.M.S. § 465.200, provides that if, on the final settle-

For references to other topics, see Descriptive-Word Index

ment of any executor or administrator, there be not sufficient assets to pay all the demands against the estate, any creditor may, at any time before the end of the succeeding term of the court after such final settlement shall have been made, suggest that such executor or administrator has not made just accounts of the assets in his hands, and apply for an inquiry into the same; and section 285 provides that if no waste be found the applicant shall pay the costs, but if waste be found judgment shall be rendered in favor of the applicant against such executor or administrator of his own proper estate for the amount wasted and costs, and that the money collected shall be applied to the payment of the debt due the applicant, and the residue apportioned among the creditors. *Held*, that proceedings cannot be invoked under sections 282, 285, until after the final settlement of the executor or administrator.

Ridgway v. Kerfoot, 22 Mo.App. 661.

Mo.App. 1922. Parties in interest to the final settlement of an estate have the right at any time during the term of a probate court at which such settlement was approved by the court to address the court's attention to its discretionary powers which the court has over its judgments rendered during such term.

State ex rel. Pargeon v. McPike, 243 S.W. 278.

⇐509 (2). Jurisdiction.

Mo. 1934. Probate court could set aside dismissal of exceptions to final settlement of administratrix de bonis non of partnership estate and reinstate such exceptions on docket during same term. Mo.St.Ann. § 231, p. 152, V.A.M.S. § 465.180.

In re Pillman Bros.' Estate, 75 S.W.2d 582, 335 Mo. 910.

Mo.App. 1912. The probate court may, on application at the same term, set aside its order approving an executor's final settlement so as to permit exceptions thereto, regardless of the merits of the exceptions.

McNally v. Hawkins, 147 S.W. 503, 163 Mo.App. 692.

⇐509 (3). Persons entitled to maintain proceedings.

Mo.App. 1891. A final settlement of an administrator has the force and effect of other final judgments, and can only be set aside by some one directly interested in it or affected by it. It cannot be set aside at the instance of a surety on a note of the administrator, given in settlement of a claim against the estate.

Voshage v. Voshage, 45 Mo.App. 172.

⇐509 (4). Grounds.

Mere illegal allowances, unless obtained by fraud, are no ground for setting aside an administrator's final settlement.

Mo. 1873. Lewis v. Williams, 54 Mo. 200.

Mo. 1878. Miller v. Major, 67 Mo. 247.

Mo.App. 1888. Phillips v. Broughton, 30 Mo.App. 148.

Mo.App. 1901. Warden v. Busbee, 89 Mo.App. 113.

The final settlement of an administrator has the force and effect of a judgment, and can only be vacated when it is made clearly to appear that it is founded on fraud or mistake.

Mo. 1883. McLean v. Bergner, 80 Mo. 414.

Mo.App. 1890. Weinerth v. Trendley, 39 Mo.App. 333.

Mo. 1871. The final settlements of executors, administrators, and guardians, when regularly approved, have the force of judgments, and can be attacked only for fraud; but such fraud may be positive and actual, with intent to cheat and wrong those interested in the estate or may consist in any improper act or concealment that operates a fraud and results in loss.

Clyce v. Griswold's Ex'r, 49 Mo. 37.

Mo. 1878. The mere fact that an executor was allowed as a credit a sum paid E., when such amount had not been paid at the time, was no ground for setting aside the executor's final settlement, where it appeared that the amount was afterwards paid, and there was no evidence showing any fraud on the part of the executor.

Miller v. Major, 67 Mo. 247.

Mo. 1880. Before a final settlement of an administrator will be set aside, there must be not only an unjust, but a fraudulent, claim allowed.

Byerly v. Donlin, 72 Mo. 270.

Mo. 1883. A mere mistake, innocently made by an administrator in an annual or final settlement, will not justify the vacation of such settlements for fraud; but the court is justified to interfere with the settlement of an administrator, when it appears that the administrator willfully omitted to charge himself with assets which he knows came to his hands, and for which he knows he has not accounted, because such conduct is a violation of that good faith which the law imposes on trustees.

Houts v. Shepherd, 79 Mo. 141.

Mo. 1883. The conduct of an administrator in mingling the money of the estate with his own, and loaning it out at interest,

and failing to account in his settlements for the interest rightfully belonging to the estate, and concealing this fact from the court and the heirs, constitutes fraud, justifying the setting aside of his final settlement.

Smiley v. Smiley, 80 Mo. 44.

Mo. 1902. If anything is settled law in Missouri, it is that mere illegal allowances or some omissions of proper debits in the accounts presented for final settlement by an administrator are not sufficient to set aside a final settlement on a charge of fraud. The fraud for which a final settlement will be set aside is exactly of the same character as that which is required to set aside any other final judgment—fraud upon the court in procuring the final settlement or judgment, and not mere errors of judgment in the court on the matters presented to it for its consideration and judgment.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 26.

Mo.App. 1877. The final settlement of an administrator may be set aside for fraud in law, though there had been no fraudulent intent on the part of the administrator.

Heitkamp v. Biedenstein, 3 Mo.App. 450.

Mo.App. 1887. Final settlements in the probate court are judgments binding on all parties, and can be vacated in equity only for reasons for which other final judgments may be vacated.

Standard v. Lacks, 25 Mo.App. 64.

Mo.App. 1890. Where, at the time of a sale of decedent's land for the payment of debts, the homestead was not included, because the administrator thought that the homestead allotted to the widow and minor child was held by them in fee simple, he not knowing that Laws 1875, p. 60, had so changed the law as to terminate such homestead right when the youngest child should attain its legal majority and the widow should die, and provided that such homestead might be sold by the legal representative of the deceased homesteader, subject to the rights of the widow and minor children, the administrator's mistake was one of law, against which relief cannot be had, and hence he cannot have his final settlement opened to permit the sale of such homestead.

Weinerth v. Trendley, 39 Mo.App. 333.

Mo.App. 1901. The omission by an administrator of certain items from his final settlement does not of itself constitute fraud in such settlement.

Warden v. Busbee, 89 Mo.App. 113.

Mo.App. 1910. The final settlement of an administrator may be corrected or set aside for the same reasons for which any other judgment may be corrected or set aside.

Michie v. Grainger, 129 S.W. 983, 149 Mo.App. 301.

Mo.App. 1911. Mere illegal allowances or omissions of proper debits do not justify the setting aside of a final settlement of an executor or administrator, nor opening up of matters passed on in approving the final settlement.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

Mo.App. 1912. The probate court after rendering a final judgment settling an estate, has no authority at a subsequent term to revoke it on the ground of mistake of law in rendering the judgment.

Lile v. Kincaid, 142 S.W. 434, 160 Mo. App. 297.

Mo.App. 1940. The circuit court erred in modifying its judgment, charging executor with excess premiums paid on his bond and interest from date on which he should have made final settlement, by charging him with premium and interest for only one year before later date on which settlement was made, though exceptions to final settlement first filed were pending at earlier date, since he could have called up such exceptions for disposition at any time had he published required notice of final settlement.

Thompson's Estate v. Martin, 133 S.W. 2d 677.

⇐509(5)-509(6).

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐509(7). Parties and process.

Mo.App. 1877. In proceedings to set aside the final settlement of an administrator, the heirs of decedent were improperly made defendants, and the proceeding should have been against the administrator alone.

Heitkamp v. Biedenstein, 3 Mo.App. 450.

⇐509(8). Evidence.

Mo. 1875. The rules presuming a stated account to be correct unless objected to in a reasonable time does not apply, upon the final settlement of an executor, to an account with which the heirs had expressed dissatisfaction, but had assented to for the avowed purpose of avoiding a difficulty.

Gamble v. Gibson, 59 Mo. 585.

Mo. 1883. In a proceeding to vacate the final settlement of an administrator, evidence *held* insufficient to show that he had falsely represented to the probate court that

all the assets of the estate had been administered and applied to the payment of debts.

McLean v. Bergner, 80 Mo. 414.

Mo.App. 1888. The final settlement of an administrator is in the nature of a final judgment, and evidence to impeach it on the ground of fraud must be clear and satisfactory. It is not enough to show that errors were committed in it.

Phillips v. Broughton, 30 Mo.App. 148.

⇐509 (9). Hearing and determination.

Mo. 1934. Order setting aside dismissal of exceptions to final settlement of administratrix de bonis non of partnership estate, and reinstating such exceptions on docket, had effect of setting aside approval of settlement and discharge of administratrix, and alleged final settlement must be treated as annual settlement and order discharging administratrix deemed void, since, when exceptions were reinstated, estate could not be fully administered until exceptions were finally determined and probate court could not make final settlement until estate was fully administered. Mo.St.Ann. § 231, p. 152, V.A.M.S. § 465.180.

In re Pillman Bros.' Estate, 75 S.W.2d 582, 335 Mo. 910.

⇐509(10). Operation and effect of opening or vacating settlement.

For cases from other jurisdictions, see other Key Number Digests.

⇐509 (11). Correction of errors in intermediate or partial accounts.

Mo.App. 1902. Annual settlements of executors and administrators are not conclusive, but are open and subject to review and correction at the final settlement.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

⇐510. Review.

⇐510(1). Nature and form of remedy in general.

Mo. 1890. On the final settlement of an administrator, the probate court having charged him with a certain sum and ordered distribution thereof, the judgment is final, and an appeal lies at once, though the settlement is continued, under Rev.St.1879, § 241, providing that the court may order the administrator to sell at public auction the notes and accounts remaining in his hands, and report the proceeds at the next term, and "said settlement shall be continued to such term."

Bronson v. Bronson, 15 S.W. 74, 102 Mo. 613.

Mo. 1891. An appeal lies from an order settling the final account of an executor and directing distribution of the estate.

Bronson v. Bronson, 15 S.W. 74, 102 Mo. 613.

⇐510 (2). Decisions reviewable.

The allowance by a probate court of an annual account of an executor or administrator is not a final judgment from which an appeal can be taken.

Mo. 1867. Baker v. Schoeneman, 41 Mo. 391.

Mo. 1884. North v. Priest, 81 Mo. 561.

Mo. 1867. Under a statute allowing an appeal from the decision of the probate court "on all demands against an estate exceeding $10," and "on all settlements of executors and administrators," an allowance to an executor of a certain sum as costs and fees, which accrued in a suit against the executor, was not an allowance of a "demand against the estate" from which an appeal could be taken.

Baker v. Schoeneman, 41 Mo. 391.

Mo. 1894. The order of approval of an administrator's final settlement is a final judgment, from which an appeal could have been taken.

Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1901. An executor presented his final settlement to the probate court, which was approved and passed, and the executor's attorney was so informed, but understood that the court meant by the word "passed" to continue the matter until the next term. The decision was entered as a judgment of the court. An appeal was subsequently taken. *Held*, that the contention that there had been no judgment on the final settlement from which an appeal could be taken was without merit.

State ex rel. Green v. Henderson, 64 S. W. 138, 164 Mo. 347, 86 Am.St.Rep. 618.

Mo.App. 1920. No appeal lies from an annual settlement of an executor, but only from a final settlement, under Rev.St.1909, § 289, V.A.M.S. § 467.010.

Peper v. Bell, 218 S.W. 438, record of Court of Appeals quashed State ex rel. Peper v. Reynolds, 226 S.W. 550. Opinion of Supreme Court conformed to Peper v. Bell, 229 S.W. 1111.

Mo.App. 1926. No appeal lies from an annual or partial settlement of administrator.

In re Wickard's Estate, 282 S.W. 173.

For later cases see same Topic and Key Number in Pocket Parts

Mo.App. 1941. An order of the probate court making an allowance of fee to attorneys for services rendered an estate, which was not made in a settlement or in connection with a settlement of the estate, was not a "final judgment" and was not appealable to the circuit court. Rev.St.1939, §§ 220, 283, Mo.St.Ann. §§ 221, 284, pp. 142, 177, V.A.M.S. §§ 465.100, 467.010.

In re Waters' Estate, 153 S.W.2d 774.

An order of the probate court setting aside judgment making an allowance of fee to attorneys for services rendered an estate, which was not made in the settlement or in connection with the settlement of estate, was not a "final judgment" and was not appealable to the circuit court. Rev.St.1939, §§ 220, 283, Mo.St.Ann. §§ 221, 284, pp. 142, 177, V.A.M.S. §§ 465.100, 467.010.

In re Waters' Estate, 153 S.W.2d 774.

Mo.App. 1942. The statutory specification, authorizing appeals to circuit courts from probate court orders compelling legatees and distributees to refund, does not authorize appeal by administratrix of decedent's estate from probate court's order setting aside its approval of final settlement and order for distribution of estate. Rev.St. 1939, § 283, subd. 12, V.A.M.S. § 467.010.

In re Rohde's Estate, 157 S.W.2d 527.

Mo.App. 1943. An appeal from an order of the probate court affecting an annual settlement of public administrator was taken from an appealable order and cause was properly before the Court of Appeals.

In re Claus' Estate, 167 S.W.2d 372.

⇐510(3). Right of review.

Mo. 1929. Legatees *held* properly allowed to appeal from judgment, on executors' final settlement, that estate was not entitled to interest on funds deposited in trust company executor. Rev.St.1919, § 282, V.A.M.S. § 467.010.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Mo. 1941. Where administrator filed petition in probate court for adjudication of question of attorneys' fees, and attorneys also filed petition which was in substance the same as that filed by administrator and was treated as seeking the same relief, and petitions were heard together and question could have been litigated if petition of attorneys had been the only one filed, attorneys under statute had right to appeal from judgment of probate court. Mo.St.Ann. § 284, p. 177, V.A.M.S. § 467.010.

In re Franz' Estate, 145 S.W.2d 400, 346 Mo. 1149.

Mo. 1953. Time and opportunity is afforded all interested persons to contest correctness of final settlement of a decedent's estate, with right of appeal, and approval by probate court of final settlement of administration constitutes final judgment, conclusive on all matters included or necessarily involved in the settlement.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

⇐510(4). Presentation and reservation in lower court of grounds of review.

Mo. 1936. Exceptions to final settlement of account of executors on specific ground that executors' charges for commissions were excessive, in view of limitation imposed in will, *held* insufficient to raise issue of propriety of commission charges on property disbursed by executors to themselves as trustees and on items referred to as rents from real estate, so that declarations with respect thereto were properly refused.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

Exceptions to final settlement of executors and trustees under will would not be considered on appeal, where no reference to item appeared in exceptions filed and it appeared for first time in brief of exceptions on appeal.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

Mo. 1942. Where the probate court never heard, tried or determined any contested matter in so far as order of probate court granting appeal of sole heir's assignee from final settlement of administrator was concerned, there was nothing for circuit court to hear, try and determine anew upon such attempted appeal. Mo.R.S.A. §§ 283, 291, V. A.M.S. §§ 467.010, 467.090.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1910. The Court of Appeals in cases involving the allowance of an executor's claim for compensation will only determine such issues as were before the trial courts.

In re Purl's Estate, 125 S.W. 849, 147 Mo.App. 105.

Mo.App. 1943. Exceptions to objectionable items of administrator's final settlement in probate court are ordinarily necessary to be filed if a review is desired, since jurisdiction of circuit court on appeal from probate court is derivative and is to be exercised only over matter actually litigated in the probate court and from which the appeal is taken.

In re Nelson's Estate, 166 S.W.2d 333, 237 Mo.App. 28.

For references to other topics, see Descriptive-Word Index

In determining whether circuit court will exercise its jurisdiction on appeal from probate court, the important consideration is whether an issue was presented to the probate court in respect to the matter, and it is immaterial whether information on such consideration is acquired from formal exceptions filed in probate court, or whether it appears otherwise from the record.

In re Nelson's Estate, 166 S.W.2d 333, 237 Mo.App. 28.

Where record showed that issue as to administrator's liability for debts claimed to be due estate from administrator which had been inventoried were tried in probate court on motion filed by administrator for correction of inventory by excluding debts from listed assets, issue was before circuit court on appeal for determination, notwithstanding that no formal exceptions were filed by heirs to administrator's final settlement. Mo.R.S.A. § 231, V.A.M.S. § 465.180.

In re Nelson's Estate, 166 S.W.2d 333, 237 Mo.App. 28.

Mo.App. 1943. Exceptions to final settlement of executrix on ground that executrix' settlements were not true, and that executrix had not charged herself with all property belonging to estate and had taken credit for items not properly charges against the estate, were too general and would not be considered by reviewing court in trying the case de novo on appeal.

Clow's Estate v. Clow, 167 S.W.2d 903, 237 Mo.App. 267.

⇐510 (5). Parties.

Mo.App. 1893. On appeal from an order of the probate court overruling exceptions to the final settlement of an administrator, it is not necessary that all the heirs join in the appeal.

In re Swan's Estate, 54 Mo.App. 17.

Mo.App. 1896. Under Rev.St.1889, § 285, V.A.M.S. § 467.090, relating to final orders or judgments in the administration of estates, and giving the right of appeal to any heir, devisee, etc., having an interest in the estate, the daughter of a deceased sister of one dying intestate as to the residue of her estate, and leaving no children, is entitled to appeal.

In re Danforth's Estate, 66 Mo.App. 586.

⇐510(6). Perfection of appeal and effect thereof.

Mo. 1890. On the final settlement by an administrator, the probate court having charged him with a certain sum, and ordered distribution thereof, an appeal was taken to the circuit court. *Held*, that the circuit court having settled the accounts of the administrator, and no motion for a new trial nor bill of exceptions having been filed during the term, the judgment was final and conclusive, and the account was not kept open by an order that the administrator sell the notes and accounts on hand, and report the proceeds at the next term, and that the settlement be continued to that term for final approval.

Bronson v. Bronson, 15 S.W. 74, 102 Mo. 613.

Mo.App. 1896. An heir, taking an appeal from the final order or judgment in the administration of an estate, is not required to give notice of the appeal.

In re Danforth's Estate, 66 Mo.App. 586.

Mo.App. 1902. Where exceptions were filed to the approval of an administrator's account, and on being overruled, and appeal taken to the circuit court, the jurisdiction of the circuit court could not be devested by any subsequent action of the probate court.

In re Hutton's Estate, 92 Mo.App. 132.

Mo.App. 1905. The filing of a claim against an estate in the probate court while the estate was pending in the circuit court on appeal from a probate decree settling the executor's accounts conferred no jurisdiction on the probate court to adjudicate the claim.

In re Cassity, 87 S.W. 595, 112 Mo.App. 714.

Mo.App. 1926. Appeal though taken technically from allowance of partial settlement, *held* effectually from final settlement where exceptions to partial settlement were not acted on until final settlement.

In re Wickard's Estate, 282 S.W. 173.

Mo.App. 1945. The filing of specific written exceptions to executrix' interim and final settlements had effect of setting aside probate court's order approving final settlement, suspending operation of such settlement and keeping testatrix' estate open, so that continuance of exceptions to later term of probate court carried over to such term question of approval or disapproval of final settlement and either party could appeal to circuit court from order disposing of exceptions at such term. Mo.R.S.A. §§ 283, 285, V.A.M.S. §§ 467.010, 467.030.

Hausaman v Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

On appeal, taken at June term of probate court, from such court's order, overruling at March term a motion, filed at preceding December term in form of exceptions to executrix' final settlement, for disallowance of certain credits shown in such settlement and prior interim settlements, circuit court

had jurisdiction to decide all matters raised by exceptions as against contention that such motion served no function and could not extend statutory time for appeal from order. Mo.R.S.A. §§ 283, 285, V.A.M.S. §§ 467.010, 467.030.

Hausaman v. Bruce, 185 S.W.2d 32, 238 Mo.App. 1173.

⇐510(7). Record and proceedings not in record.

Mo. 1936. Where exceptors to administrator's first and final settlements called as witness only probate court clerk, who produced and identified records and files, and where numerous accounts, claims, canceled checks, vouchers, and receipts, which were in evidence and presented to trial court, were not shown in record on appeal from judgment overruling exceptions, reviewing court eliminated exceptions that credits for amounts allegedly paid to exceptors did not show for what they were paid, that "proper" vouchers had never been filed therefor, and that exceptors denied receiving such amounts, and other exceptions unsupported by record.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Reviewing court affirmed judgment overruling exception to credits allowed administrators in final settlement without prior order or judgment allowing claims which credits represented, as regards credit allowed for taxes paid by administrators, although tax receipts were not shown in record, where tax receipts were in evidence and before trial court, since reviewing court was required to assume that trial court found taxes such as are properly payable without demand. Mo. St.Ann. § 182, p. 108, V.A.M.S. § 464.010.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo.App. 1910. A judgment in an action by an administrator against the estate to have his accounts allowed must be affirmed on appeal, where the record does not show which items in plaintiff's account were allowed, and which were rejected.

Smith v. Brinkley, 132 S.W. 301, 151 Mo. App. 494.

Mo.App. 1940. A contention that bond in amount of that given by executor was too great to be carried on testator's estate during entire course of its administration cannot be considered on appeal from judgment disposing of distributees' exceptions to executor's final settlement, in absence of anything in record to indicate that probate court did not require bond in such amount.

Thompson's Estate v. Martin, 133 S.W. 2d 677.

Mo.App. 1943. Where abstracts furnished by parties on appeal from judgment entered in proceeding on exceptions to settlements of executrix contained only portions of the evidence and did not purport to set out all evidence, reviewing court would not convict trial court of error in its findings of fact and conclusion of law.

Clow's Estate v. Clow, 167 S.W.2d 903, 237 Mo.App. 267.

⇐510(8). Scope of review in general.

Mo. 1876. In reviewing a judgment of the circuit court on appeal from the probate court in the matter of the final settlement of an administrator, the Supreme Court will confine its inquiries to the matters determined in the circuit court.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1890. On the final settlement by an administrator, the probate court charged him with a certain sum, and ordered distribution thereof. *Held*, that on appeal from the order of distribution, under Rev.St.1879, § 292, V.A.M.S. § 467.090, the court will review the order fixing the amount due from the administrator.

Bronson v. Bronson, 15 S.W. 74, 102 Mo. 613.

Mo. 1897. An allowance of expenses and attorney's fees to an administratrix, by the referee and the lower court, before whom the expenses were incurred and the services rendered, will not be disturbed where there is no showing of unfairness in the allowance.

Scudder v. Ames, 43 S.W. 659, 142 Mo. 187.

Mo. 1898. On a trial for settlement of an administrator's annual accounts, certain allowances were severally excepted to by appellants orally, on a presentation of each of the settlements by the administrator. The exceptions were overruled by the court. The circuit court in trying the case was acting as and for the probate court, in which written pleadings are not required. *Held*, that the rulings on these exceptions were reviewable in the Supreme Court in like manner as the rulings on written exceptions.

Clark v. Bettelheim, 46 S.W. 135, 144 Mo. 258.

Mo. 1911. Where, on appeal to the circuit court from a final settlement of a decedent's estate in the probate court, the parties interested stipulated for the appointment of a receiver, the allowance of compensation to such receiver by the circuit court will not be disturbed on appeal, though there is doubt as to the power of the circuit court to make such appointment.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

An allowance to such receiver of statutory commissions on moneys collected and disbursed in addition to the other compensation allowed him was improper, as his appointment did not displace the regular executors, and to allow him commissions would impose a double liability on the estate for compensation.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo. 1918. In view of Rev.St.1899, § 143, V.A.M.S. § 462.360, allowing the probate court to order representatives of an estate to pay off incumbrances, and sections 278 and 279, as to appeals from probate court where no appeal was taken by residuary legatee from orders of probate court allowing payment of a deed of trust on testator's land and approving annual settlement of executors crediting them with payment, assignment of error in allowing the payment on a later settlement would be overruled.

Roloson v. Riggs, 203 S.W. 973, 274 Mo. 522.

Mo. 1929. Appeal from judgment that estate was not entitled to interest on funds deposited in trust company executor *held* triable de novo. Rev.St.1919, § 223, V.A.M.S. § 465.080.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Mo. 1935. On appeals from judgments on exceptions to final settlements of executors, etc., Supreme Court is not bound by trial court's finding on conflicting evidence, but will consider both law and fact questions.

McCune's Estate v. Daniel, 76 S.W.2d 403.

Mo. 1936. Exceptions to final settlement of executors would not be considered on appeal where not supported by evidence and not briefed by exceptors but apparently abandoned.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

On appeal from probate court's disposition of exceptions to final settlement of executors, jurisdiction of circuit court is appellate and, although matters are heard de novo, only issues which are presented in probate court and on which appeal was taken are tried.

In re Shelton's Estate, 93 S.W.2d 684, 338 Mo. 1000.

Mo. 1936. Heirs' exceptions to credits allowed administrators in semiannual settlement for claims paid, made on ground that claims were not presented as demands to and allowed by probate court, *held* properly overruled, in view of evidence indicating that claims were properly allowed and that heirs approved allowance and did not contest or appeal from allowance or otherwise directly attack claims. Mo.St.Ann. §§ 212, 222, 284, pp. 137, 145, 177, V.A.M.S. §§ 462.270, 465.280, 467.040.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo. 1941. Where exceptions were filed as to credits taken by administrator in settlement, but such exceptions were not briefed in Supreme Court, judgment of circuit court as to them would be affirmed.

In re Franz' Estate, 145 S.W.2d 400, 346 Mo. 1149.

Mo.App. 1882. An annual settlement of an administrator is not, like a final settlement, conclusive; but, while it can be corrected or modified, such correction or modification must be by the administrator, or the court having jurisdiction of his accounts, and it cannot be disregarded or modified by the circuit court on appeal.

Peters v. Clendenin, 12 Mo.App. 521.

Mo.App. 1889. The trial in the circuit court on appeal from a final settlement of a special administrator in the probate court is a trial anew of the whole case, and the court is invested with power to review every item in the settlement.

In re Boothe's Estate, 38 Mo.App. 456.

Mo.App. 1891. A final settlement of a decedent's estate is analogous to a proceeding to take an account before a master in chancery, and the Court of Appeals, on reviewing the questions presented, acts as chancellor.

In re Meeker's Estate, 45 Mo.App. 186.

Mo.App. 1896. The administration and settlement of an estate in the probate court is analogous to a proceeding to take an account before a master in chancery, and where objections or exceptions to such a settlement are filed the proceedings thereon are essentially equitable, and must be tried and reviewed as such.

In re Danforth's Estate, 66 Mo.App. 586.

Mo.App. 1902. Allowances approved in an annual settlement are subject to review on the final settlement of an administrator.

Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.

Mo.App. 1930. On appeal from rulings on exceptions to final settlement of administrator of partnership estate, circuit court may consider only matter passed on by probate court. Rev.St.1919, §§ 287, 289, V.A.M.S. §§ 467.070, 467.090.

In re Harr & Harr's Estate, 22 S.W.2d 209, 224 Mo.App. 6.

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Mo.App. 1941. On appeal from order of probate court disallowing certain credits claimed by administrator in annual settlement, the power of circuit court was derived from that of probate court and was no greater and no less than power which probate judge had exercised.

In re Claus' Estate, 147 S.W.2d 199.

Mo.App. 1943. Review by the Court of Appeals of orders approving public administrator's annual account is analogous to an accounting in equity, although the action remains an action at law, and it becomes duty of court of appeals to review both the facts and the law.

In re Claus' Estate, 167 S.W.2d 372.

Mo.App. 1945. In proceeding involving issue of decedent's mental capacity to execute a receipt, excluding some evidence having bearing on issue of competency was not error when offered in connection with incompetent evidence.

In re Nelson's Estate, 185 S.W.2d 890.

⇐510(9). Presumptions.

Mo. 1936. On appeal from judgment overruling exceptions to credits allowed administrators on final settlement, made on ground that credits represented claims not formally presented and allowed, where items for which credits were allowed were shown by receipts and vouchers filed with final settlement, which were before trial court, but did not appear in record, reviewing court assumed, under facts, that trial court found that items represented expenditures in preservation and administration of estate allowable without prior formal allowance.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo.App. 1898. Where it is not shown whether or not an administrator gave four weeks' notice of his intention to make final settlement, as required by Rev.St.1889, § 231, V.A.M.S. § 465.150, it will be presumed that notice was given, as without it the probate court would not be authorized to make final settlement and discharge the administrator.

State, to Use of Cardwell, v. Stuart, 74 Mo.App. 182.

Mo.App. 1914. A credit allowed by the probate court on final settlement of an administrator for moneys advanced to the estate must be presumed to be proper, in the absence of any evidence to the contrary.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

Mo.App. 1927. Rule that allowance to administrator will be presumed to be reasonable *held* inapplicable, where facts show that allowance exceeding statutory commissions was excessive. V.A.M.S. §§ 465.100, 461.810.

Gump's Estate v. Jacobs, 292 S.W. 81, 222 Mo.App. 545.

Mo.App. 1941. On appeal from circuit court judgment allowing certain credits claimed by administrator in annual settlement, the case was reviewable not only as to the law involved but also as to the facts in issue, as against administrator's contention that in absence of certain vouchers from the record presumption must be indulged that all items allowed by circuit court were supported by substantial evidence and that judgment was correct unless showing was made to the contrary.

In re Claus' Estate, 147 S.W.2d 199.

⇐510(10). Discretion of lower court.

For cases from other jurisdictions, see other Key Number Digests.

⇐510(11). Questions of fact, and findings.

Mo. 1911. On appeal from the probate court to the circuit court from a settlement of executors, findings of fact of the circuit court *held* sustained by the evidence.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

On final accounting by executors, evidence *held* sufficient to warrant findings of the circuit court on appeal from the probate court that certain notes belonging to the estate were worthless and uncollectible, and that the executors were entitled to credit for the amount thereof as against the inventory.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

On executors' final accounting, findings of the circuit court on appeal from the probate court as to the amount of rents collected by the executors during their administration *held* supported by the evidence.

Judson v. Bennett, 136 S.W. 681, 233 Mo. 607.

Mo.App. 1902. On appeal from the circuit court from the final settlement of an administrator, the settlement is reviewable, both as to law and facts.

In re Ansley's Estate, 68 S.W. 609, 95 Mo.App. 332.

Mo.App. 1902. An appeal from a judgment on exceptions to an administrator's final settlement extends to both law and facts.

Springfield Grocer Co. v. Walton, 69 S.W. 477, 95 Mo.App. 526.

Mo.App. 1919. Trial court hearing exceptions to executor's account having had evi-

dence before him as to value of legal services rendered executor, and having been competent to pass on value of services even without testimony, his finding that fee of $250 paid by executor was excessive by $150 will not be disturbed.

In re Egan's Estate, 209 S.W. 989.

Mo.App. 1920. In addition to the 5 per cent. commission allowed on disbursements, an administrator pendente lite is entitled to reasonable and proper allowance for his services in collecting and preserving the estate, and the probate court's allowance of such compensation, not shown to be unreasonable, cannot be reversed.

In re Buck's Estate, 220 S.W. 714.

⇐510 (12). Proceedings and determination in appellate court.

Mo. 1873. Where the administrator of a husband's estate is erroneously charged with the value of goods which are the absolute property of the wife, but which were inventoried by the administrator, and the court at general term corrected the error, the administrator was not injured.

Walsh's Estate v. Morrissey, 54 Mo. 309.

Mo. 1879. On appeal by an administrator from the report of a referee appointed in proceedings for final settlement, it appeared that in the final settlement the administrator had taken credit for payments to a certain firm under allowance in favor of an individual creditor of the estate. *Held*, that the administrator could not object to the judgment in favor of this firm on the ground that there was no evidence that they were, as they claimed to be, assignees of the individual creditor.

In re Camp's Estate, 6 Mo.App. 563, affirmed Camp's Creditors v. Camp's Adm'r, 74 Mo. 192.

Mo. 1890. The circuit court has no jurisdiction on appeal to order the sale of notes and accounts of a decedent's estate, nor to take an account of their proceeds; Rev.St. 1879, §§ 297, 300, V.A.M.S. §§ 467.070, 467.110, providing that the appeal shall not be a supersedeas in any other matter, except that in which the appeal is specially taken, and that the proceedings in the circuit court shall be certified back to the probate court.

Bronson v. Bronson, 15 S.W. 74, 102 Mo. 613.

Mo. 1936. On appeal from judgment overruling exceptions to administrators' first and final settlements, generalities in argument which might be taken as referring to some phase of exceptions were deemed abandoned, where not briefed or presented.

Hoffmeyer v. Mintert, 93 S.W.2d 894.

Mo. 1942. Where administrator and person seeking to surcharge final settlement both appealed from order approving final settlement, and items embraced in separate appeals overlapped and constituted but one case in probate court, appeals should retain their unity and be treated as one case in review tribunal to the end that only one judgment be entered.

In re Mills' Estate, 162 S.W.2d 807, 349 Mo. 611.

Mo.App. 1889. Where the account of an administrator was approved in the probate court, and on appeal to the Supreme Court it was decided that one item of credit had been erroneously allowed, it was improper to enter judgment against the administrator for the amount of this item; but the proper course was to enter a judgment disallowing and disapproving the final settlement in so far as this item was concerned, and to certify such ruling and judgment in probate court.

Garr v. Harding, 37 Mo.App. 24.

Mo.App. 1893. On appeal from an order of the probate court overruling exceptions to the final settlement of an administrator, a claim that one of the objectors had no interest in the estate was no ground for an objection to the admission of any evidence.

In re Swan's Estate, 54 Mo.App. 17.

Mo.App. 1905. Where a probate decree settling an executor's accounts was appealed to the circuit court, the latter's jurisdiction was limited to passing on the matters presented by the appeal, and hence it had no authority to remand the case to the probate court to hear and determine a claim filed therein pending the appeal.

In re Cassity, 87 S.W. 595, 112 Mo.App. 714.

Mo.App. 1914. Under Rev.St.1909, § 296, V.A.M.S. § 467.090, *held* that though on trial of administrator's claim to commissions he disclaimed any claim as to commissions as temporary administrator, and though his claim as permanent administrator was properly disallowed, the circuit court should allow him a reasonable fee for his services as temporary administrator.

In re Lutz's Estate, 170 S.W. 334, 181 Mo. App. 267.

Mo.App. 1934. Where settlements of adminstrator of the estates of deceased husband and wife contained numerous erroneous charges and credits in respect of both estates which were administered together, but record does not contain sufficient facts on which to base final judgment, judgment of trial court approving administrator's final settlement in wife's estate must be reversed for new trial.

Jones v. Redman, 75 S.W.2d 80.

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Mo.App. 1939. Notes secured by trust deeds, which were executed in favor of guardian and curator of insane person by his wife, and represented improper loan made by guardian and curator to himself from estate funds, should not be canceled by circuit court on appeal from orders of probate court on exceptions to final settlement, since cancellation of notes would be tantamount to canceling trust deed, which only court of equity could do.

In re Ermeling's Estate, 131 S.W.2d 912, transferred 119 S.W.2d 755.

Mo.App. 1940. All cases in which the principles and rules of equity may be invoked are tried de novo by the Court of Appeals, and hence controversy growing out of a final report and settlement of administratrix would be so tried by the Court of Appeals on appeal.

In re Helm's Estate, 136 S.W.2d 421.

Mo.App. 1940. On final settlement of deceased's estate, where executor sold securities at great loss, and there was no evidence as to diligence or want of diligence on the part of the executor in seeking to collect on the securities, cause was remanded to circuit court to determine whether executor was entitled to credit for apparent loss sustained at public sale of assets, and whether loss was occasioned by want of diligence on part of executor. Mo.St.Ann. § 113, p. 75, V.A.M.S. § 463.020.

In re Flynn's Estate, 142 S.W.2d 1069.

Mo.App. 1941. On appeal from judgment allowing certain credits against proceeds of sale of decedent's real estate, claimed by administrator in annual settlement, where evidence did not disclose which of such items, if any, constituted expenses necessarily incurred in connection with sale of real estate and failed to establish reasonableness of such charges, Court of Appeals could not determine which credits should be allowed and which disallowed, as ordinary expenses of administration, and would, therefore, remand case to circuit court for new trial. Mo.St.Ann. §§ 142, 146, 166, 292, pp. 88, 94, 102, 184, V.A.M.S. §§ 463.150, 463.170, 463.190, 467.090

In re Claus' Estate, 147 S.W.2d 199.

Mo.App. 1943. Order approving public administrator's annual account, showing a credit for commission paid to real estate agent for selling estate real estate, which was in excess of 5 per cent. commission allowed to administrator, was modified by reducing amount accordingly, which allowance to agent would deprive administrator of subsequent allowance to himself. Mo.R.S.A. § 141, V.A.M.S. § 463.170.

In re Claus' Estate, 167 S.W.2d 372.

Allowance of $400 attorney's fees to administrator's attorney for services in connectoin with the sale of real estate to pay debts was reduced to $200 where large part of the work was not incidental to the sale of the real estate, or was not necessary, or was such work as could have been performed by administrator. Mo.R.S.A. §§ 141, 220, V.A.M.S. §§ 463.170, 465.100.

In re Claus' Estate, 167 S.W.2d 372.

Public administrator's annual account showing expenses incident to the sale of real estate for the payment of debts was modified by striking therefrom an item of $15 for reporting in probate court, by reducing agent's commission to five per cent. of amount realized from sale of land and by reducing amount of attorney's fees from $400 to $200, and administrator was surcharged for balance in excess of such allowance. Mo.R.S.A. §§ 141, 220, V.A.M.S. §§ 463.170, 465.100.

In re Claus' Estate, 167 S.W.2d 372.

Mo.App. 1943. Proceeding on exceptions to administrator's settlement was an "equitable proceeding" and on appeal reviewing court would hear and determine the matter de novo.

Clow's Estate v. Clow, 167 S.W.2d 903, 237 Mo.App. 267.

⇐510 (13). Operation and effect of decision of appellate court.

Mo.App. 1944. Where circuit court assumes to act upon fee of an attorney for an executor or administrator, and certifies result to probate court, probate court must proceed according to decision of circuit court, but where circuit court has made no adjudication upon the question, probate court has jurisdiction to make an allowance for the attorney's fee. Mo.R.S.A. §§ 220, 293, V.A.M.S. §§ 465.100, 467.110.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

Where Supreme Court on appeal from judgment relating to a public administrator's final settlement, in reversing judgment made no reference to an allowance of a fee for administrator's attorney for defending the final settlement, and circuit court entered new judgment conforming to Supreme Court's decision, without reference to attorney's fee, and certified its judgment to probate court, probate court did not lack jurisdiction to make an allowance for the attorney's fee. Mo.R.S.A. §§ 220, 293, V.A.M.S. §§ 465.100, 467.110.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

⇐511. Costs and expenses.

⇐511(1). In general.

Mo. 1924. Though an administratrix assigned all her interest in the estate, including her commissions and a judgment against the estate to her attorney, where parties excepting to her final settlement sought to have her charged with items for which she and her surety would have been liable, attorney's fees for defending the settlement could not be denied on theory that the attorney was in fact representing himself.

In re Wenzel's Estate, 263 S.W. 110, affirming In re Wenzel, 243 S.W. 395.

Mo.App. 1931. Creditor, heir, or legatee is not entitled to participate in funds of estate until costs of administration are paid.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Mo.App. 1944. Where defense is necessary or beneficial to deceased's estate, an allowance for a fee for a public administrator's attorney for defending a final settlement is authorized under statute providing that in executor's or administrator's settlements court shall allow reasonable charges for "legal advice and services". Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

A reasonable attorney's fee for defense of a final settlement is a proper "cost of administration" for which an executor or administrator is entitled to receive credit. Mo. R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

With other matters arising on settlements of executors or administrators, probate court has jurisdiction under statute to allow reasonable charges for legal advice and service including an allowance of an attorney's fee for defending a final settlement. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

An allowance of charges for legal advice and service in settlements of executors and administrators is not a matter of course, and it must be judicially determined whether services were necessary or beneficial to estate and what their reasonable value might be. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

The circuit court has jurisdiction to make an allowance of an attorney's fee for services in defending a final settlement of an executor or administrator. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

Where an executor or administrator has discharged his duties in good faith, and in main has rendered a true accounting, an attorney's fee for defending a final settlement is a proper charge against estate. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

Where public administrator prevailed on appeal to Supreme Court upon all contested items of his final accounting, except item of his commission, which involved doubtful legal question, and administrator acted in good faith, even if improvidently, in some respects, administrator's attorney was entitled to an allowance against estate for a fee for defending administrator's final settlement. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

⇐511 (2). Allowance to or against contestants.

Mo. 1918. Where residuary legatee filed 21 exceptions to annual report of executors, and was sustained as to only three of them on appeal to circuit court, that court did not abuse its discretion in taxing one-half costs to time of trial to legatee.

Roloson v. Riggs, 203 S.W. 973, 274 Mo. 522.

Mo.App. 1944. Where on an appeal by a public administrator's attorney from a denial of attorney's fee, Court of Appeals allowed a fee, costs of appeal were taxed for attorney against estate's creditors opposing fee.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

⇐511(3). Allowance to or against executor or administrator.

Mo. 1889. Under Rev.St. § 229, V.A.M.S. § 465.100, providing that executors and administrators shall be allowed "all reasonable charges for legal advice and service," an executrix is entitled to attorney's fees for defending her final settlement in the probate and circuit courts.

Jacobs v. Jacobs, 12 S.W. 457, 99 Mo. 427.

Mo. 1906. Where an executor and testamentary trustee was faithful in the management of the estate and preserved it by good business judgment, and he claimed under advice of counsel that by the terms of the will the proceeds of certain land belonged to him in a suit by the heirs of the devisees and leg-

atees for an accounting, he should have been allowed a reasonable attorney's fee.

Albert v. Sanford, 99 S.W. 1068, 201 Mo. 117.

Mo. 1947. Where issue presented by widow's exceptions to executors' final settlement was essentially executors' right to take credit for payments that they were required to make for real estate taxes and federal estate taxes and which they had made from the only funds in their hands or under their control, and trustees and heirs at law were not before court, approving allowance of $750 to executors to cover incidental costs of appeal from order overruling exceptions was not error.

In re Poe's Estate, 201 S.W.2d 441, 356 Mo. 276.

Mo.App. 1891. Under Rev.St.1879, § 229, an administrator is entitled to a reasonable attorney's fee for defending his final settlement.

In re Meeker's Estate, 45 Mo.App. 186.

Mo.App. 1908. An executor should not be allowed an attorneys' fee for making and defending the final settlement, he having received credit for a payment he made an attorney under an agreement that the attorney was to receive this in full for services rendered and to be rendered by him in connection with the estate, including the final settlement, and all litigation had or that might be had in connection with the estate, and it not appearing that the estate was involved in any other litigation than the unwarranted resistance by the executor of an order for payment to a legatee.

In re Peters, 107 S.W. 406, 128 Mo.App. 666.

Mo.App. 1914. Where, on final settlement of an administrator, the principal question litigated involved the distribution of assets remaining in his hands, and on the facts disclosed the objector to the settlement was entitled to all thereof, the administrator was not entitled to counsel fees for defending the settlement.

In re Whitlow's Estate, 167 S.W. 463, 184 Mo.App. 229.

⊂⊃511 (4). Amount.

Mo. 1947. Where issue presented by widow's exceptions to executors' final settlement was essentially executors' right to take credit for payments that they were required to make for real estate taxes and federal estate taxes and which they had made from the only funds in their hands or under their control, and trustees and heirs at law were not before court, approving allowance of $750 to executors to cover incidental costs of appeal from order overruling exceptions was not error.

In re Poe's Estate, 201 S.W.2d 441, 356 Mo. 276.

Mo.App. 1944. In determining amount of an allowance for fee of a public administrator's attorney for defending administrator's final settlement, there could be no charge against estate for services rendered in connection with administrator's own appeal by which he was permitted to take credit for item which he had inadvertently omitted from his settlement as filed. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

The question of amount of fee for public administrator's attorney for defending adminisrator's final settlement was a question of fact to be determined in first instance by court below and not by Court of Appeals. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

⊂⊃511(5). Proceedings for assessment and collection.

Mo.App. 1932. Allowances in probate court of attorneys' fees were for expenses of administration, and in absence of timely appeal became "final judgments". Rev.St.1929, § 284, V.A.M.S. § 467.010.

In re Carlin's Estate, 47 S.W.2d 213, 226 Mo.App. 622.

⊂⊃512. Operation and effect.

⊂⊃513. —— In general.

⊂⊃513(1). In general.

A settlement in the probate court, without appeal, is, in the absence of any showing of fraud or irregularity, a bar to an action either at law or in equity upon the administrator's account.

Mo. 1871. Picot v. Bates, 47 Mo. 390.

Mo. 1873. Lewis v. Williams, 54 Mo. 200.

Mo. 1879. Woodworth v. Woodworth, 70 Mo. 601.

Mo. 1884. Van Bidder v. Julian, 81 Mo. 618.

Mo.App. 1880. Haeussler v. Scheitlin, 9 Mo.App. 303.

Mo. 1875. The action of county and probate courts in regard to settlements by administrators, guardians, and curators is judicial; and therefore a final settlement with the court is conclusive as long as it stands, and can be set aside only on appeal, or by bill in equity brought in the circuit court on the ground of fraud or mistake.

State, to Use of Carroll County, v. Roberts, 60 Mo. 402.

Mo. 1875. The assent of one subsequently an executor, before probate of the will and before his appointment, to a settlement of the testator's estate, and a judgment of the probate court, rendered in vacation, ratifying such settlement, are both void; and a subsequent order in term time merely confirming the supposed judgment is not itself a judgment, and cannot impart validity to the prior proceedings.

Stockton v. Ransom, 60 Mo. 535.

Mo. 1886. The decree of a surrogate having jurisdiction, settling the accounts of executors, has, until opened or set aside, the same conclusive effect as the judgment of any other court.

Robards v. Lamb, 1 S.W. 222, 89 Mo. 303, affirmed 8 S.Ct. 1031, 127 U.S. 58, 32 L.Ed. 60.

Mo. 1891. A settlement, made by an executor of one who was an administrator of an estate, with the estate of which the latter was administrator, must be presumed to have been made in accordance with the requirements of law.

State ex rel. Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo. 1915. Where a final settlement was invalid as such because the estate had not been fully administered, it will be treated as an annual settlement, not discharging the administratrix.

State ex rel. Knisely v. Holtcamp, 181 S.W. 1007, 266 Mo. 347.

Mo. 1924. Generally, a final settlement is enforceable at expiration of statutory period for administering estates, in absence of an extension of time for good cause granted by probate court.

In re McElevey's Estate, 266 S.W. 123, 305 Mo. 244.

Mo.App. 1880. While her final settlement and discharge remain in full force, the administratrix has no legal capacity to bring suit on a demand which through mistake or oversight was not put in her inventory and has not been included in any settlement made by her.

Goebel v. Foster, 8 Mo.App. 443.

Mo.App. 1911. The right to directly attack for fraud a final settlement of administration extends to any person in interest in the estate.

Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

⇐513(2). Ex parte settlements.

Mo. 1898. A statement by a former administrator, filed by order of probate court, without notice, in lieu of a final settlement, and reciting that no assets had been received, nor money paid out, is not conclusive against a corporation defendant seeking to defeat an action to recover for shares of its stock alleged not to have been delivered to decedent by proving a delivery to such former administrator.

Van Liew v. Barrett & Barrett Beverage Co., 46 S.W. 202, 144 Mo. 509.

A settlement by an administrator, without the publication of intention to apply for settlement of his accounts, as required by Rev.St.1889, § 231, V.A.M.S. § 465.160, would not have the force and effect of a judgment.

Van Liew v. Barrett & Barrett Beverage Co., 46 S.W. 202, 144 Mo. 509.

⇐513(3). Collateral attack.

A final settlement of an administration has the force of a final judgment, and cannot be attacked collaterally, but can only be reached under charges of fraud by a direct proceeding.

Mo. 1891. State ex rel. Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo. 1926. Repetto v. Walton, 281 S.W. 411, 313 Mo. 182.

Mo.App. 1911. Goodman v. Griffith, 134 S.W. 1051, 155 Mo.App. 574.

The order of approval of an administrator's final settlement is a judgment which is not subject to collateral attack.

Mo. 1894. Rogers v. Johnson, 28 S.W. 635, 125 Mo. 202.

Mo. 1897. Howell v. Jump, 41 S.W. 976, 140 Mo. 441.

Mo.App. 1916. State ex rel. Noll v. Noll, 189 S.W. 582.

The settlements and allowances of administrators, curators, and guardians, in the proper courts, are considered equivalent to judgments of such courts, and conclusive between the parties in interest. They cannot be collaterally impeached in suits upon the bonds, nor otherwise than by proceedings expressly instituted for such purpose, setting forth the fraud, or other ground, on which the plaintiff seeks to surcharge and falsify.

Mo. 1856. State, to Use of Tourville, v. Roland, 23 Mo. 95.

Mo. 1856. Whittelsey v. Dorsett, 23 Mo. 236.

Mo. 1874. A final settlement is reviewable in a suit on an administration bond.

State ex rel. Public Adm'r of Daviess County v. Lankford, 55 Mo. 564.

Mo. 1876. The final settlement of an administrator must be seasonably and di-

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rectly assailed, in order to avoid its effect as a judgment importing absolute verity.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1910. Where an administrator selling real estate under an order of the probate court duly made, directing the sale to pay decedent's debts, made a report to the probate court approving the sale and final settlement reciting that he did not directly or indirectly purchase the real estate, and that the purchaser had complied with the terms of the sale and had paid a specified sum and that an additional sum should be paid within a specified time, he could not be heard to say that the purchaser did not pay the price and that he paid it, and thus collaterally attack the judgment approving his final settlement.

Pearson v. Murray, 130 S.W. 21, 230 Mo. 162.

Mo. 1915. Under Rev.St.1909, § 239, V.A.M.S. § 465.170, a judgment of final settlement by the probate court is open to collateral attack, where notice has not been duly published, despite finding of publication.

State ex rel. Knisely v. Holtcamp, 181 S.W. 1007, 266 Mo. 347.

Under Rev.St.1909, § 239, V.A.M.S. § 465.170, a judgment of final distribution is subject to collateral attack, where the estate had not in fact been fully administered and an action on demands against it was pending in a court of concurrent jurisdiction.

State ex rel. Knisely v. Holtcamp, 181 S.W. 1007, 266 Mo. 347.

Mo. 1922. Notwithstanding Rev.St.1919, § 73, V.A.M.S. § 462.120, which provides that inventories or appraisement of an estate shall not be conclusive against an executor, where an executor has submitted a final settlement of his administration in the knowledge that some of his own personal property was mixed with testatrix's and the settlement has become the judgment of the probate court, it must stand until set aside in a proceeding for that purpose; hence, in an action by a husband to have declared his ownership of one-half his deceased wife's estate, evidence that his own personal property was mixed with that of the deceased wife's in the inventory of her estate was inadmissible.

Lynch v. Jones, 247 S.W. 123.

Mo. 1947. Probate court order approving a settlement to revocation between retiring administratrices and executor was a final judgment so far as administratrices were concerned and subsequent action by executor for breach of administratrices' bond was a collateral attack thereon. Mo.R.S.A. §§ 48, 49, 213, V.A.M.S. §§ 461.550, 461.560, 465.010.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Mo.App. 1877. The judgment of a probate court settling the accounts of an administrator is conclusive on the surety of the executor, in so far that he cannot attack it, except in a direct proceeding for fraud; for, as surety, he had the right of appeal.

Wolff v. Schaeffer, 4 Mo.App. 367.

Mo.App. 1903. The final settlement of an executor cannot be attacked for fraud in a collateral proceeding, but can only be attacked by a direct proceeding in equity on the ground of fraud perpetrated on the court in the very act of procuring the judgment.

State ex rel. Gray v. Carroll, 74 S.W. 468, 101 Mo.App. 110.

Final settlements of executors are final judgments, which cannot be attacked for fraud in a collateral proceeding; and where, in an action on an executor's bond, defendant pleaded such a settlement, and plaintiff, in his reply, admitted the same, but alleged fraud, it was error to render judgment for plaintiff.

State ex rel. Gray v. Carroll, 74 S.W. 468, 101 Mo.App. 110.

Mo.App. 1909. A judgment of the probate court, by which an estate is finally settled and the administrator discharged, is conclusive against all proceedings other than a direct attack to set aside the judgment on the ground of fraud; and hence, where items of allowances made to certain heirs were all charged to the executrix's annual allowances and approved by the probate court upon the final settlement of the administrator de bonis non, after due notice, contribution of such heirs could not be subsequently compelled in a collateral proceeding.

Mueller v. Grunker, 123 S.W. 469, 145 Mo.App. 611.

Mo.App. 1910. Where the final settlement of an administrator omitting a certain item had been concluded, the settlement could not be collaterally attacked for such error.

Michie v. Grainger, 129 S.W. 983, 149 Mo.App. 301.

Mo.App. 1931. Judgment of probate court approving final settlement is not subject to collateral attack.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

For references to other topics, see Descriptive-Word Index

If notice of intention to make final settlement of estate is not published as required, probate court's judgment approving final settlement would be void.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Notice that final settlement of estate would be made August 9, 1926, *held* insufficient to confer jurisdiction on probate court to render judgment approving settlement filed 1928. Rev.St.1919, § 229, as re-enacted by Laws 1923, p. 109, V.A.M.S. § 465.160.

Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254.

Mo.App. 1945. Ordinarily a judgment of probate court approving final settlement and discharging administrator must be seasonably and directly assailed in order to avoid its effect as a judgment importing absolute verity.

Foster v. Wright, 187 S.W.2d 974, 239 Mo.App. 386.

Mo.App. 1949. Where affidavit for appeal from judgment in probate court in favor of claimant against decedent's estate was pending and estate had thus not been fully administered, order permitting administrator to file final settlement and be finally discharged was void for want of jurisdiction, and administration was still pending for purpose of mandamus proceeding to compel probate court to certify record to circuit court for hearing on appeal. Mo.R.S.A. §§ 230, 283, V.A.M.S. §§ 465.170, 467.010.

State ex rel. Jones v. Davis, 216 S.W.2d 155, 240 Mo.App. 411.

⇐513(4). Settlements operating as final.

Mo. 1875. A final settlement in a probate court as to matters within its jurisdiction and in issue is conclusive between the parties unless reversed or set aside on appeal, and the same issues cannot be afterwards litigated by an independent proceeding in the circuit court; nor can the same issue be so litigated pending such an appeal.

Townsend v. Townsend, 60 Mo. 246.

Mo. 1891. Where the personal representative of a deceased administrator has settled the latter's account with the estate of his decedent in accordance, as must be presumed, with the requirements of law, the final settlement by the administrator d. b. n. of such estate is also a final settlement of the account of such deceased administrator.

State ex rel. Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo. 1894. In an action by an administrator de bonis non to compel a final accounting by his predecessor the latter's so-called "answer" to the petition, setting forth an attempted final settlement before plaintiff's appointment, together with a supplemental settlement proposed by him, in which he confesses further indebtedness to the estate, will be considered as the "settlement," or statement of accounts in writing to be filed in the probate court, required by Rev. St.1889, §§ 47, 48, V.A.M.S. §§ 461.550, 461.560, which provide for a "final settlement" with his successor by an outgoing executor.

Emmons v. Gordon, 28 S.W. 863, 125 Mo. 636.

Mo. 1943. A "settlement to revocation" between a retiring personal representative and his successor is final when approved by the court and the successor but such settlements are not "final settlements" of the estate and the administration is unaffected and while creditors are precluded from disputing such settlements they are not deprived of the right to have their claims satisfied out of the estate turned over to the successor representative. Mo.R.S.A. §§ 48, 49, V.A.M.S. §§ 461.550, 461.560.

In re Thomasson's Estate, 171 S.W.2d 553, 350 Mo. 1157.

Mo. 1947. Probate court order approving a settlement to revocation between retiring administratrices and executor was a final judgment so far as administratrices were concerned and subsequent action by executor for breach of administratrices' bond was a collateral attack thereon. Mo.R.S.A. §§ 48, 49, 213, V.A.M.S. §§ 461.550, 461.560, 465.010.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Mo. 1953. Time and opportunity is afforded all interested persons to contest correctness of final settlement of a decedent's estate, with right of appeal, and approval by probate court of final settlement of administration constitutes final judgment, conclusive on all matters included or necessarily involved in the settlement.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

Mo.App. 1928. Purported final settlement by administrator made without notice, does not have force of final settlement.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

Supplemental final settlement and order of distribution made without notice to distributee *held* not effective as final settlement.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

⇐513(5). Successive administrations.

Mo. 1894. A final settlement, made by an executor or administrator who has re-

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signed or been removed, and which is made before the appointment of his successor, has no greater force or effect than the annual settlement.

Emmons v. Gordon, 28 S.W. 863, 125 Mo. 636.

Under Rev.St.1889, § 48, V.A.M.S. § 461.-560, providing that an executor, upon his resignation, shall make a final settlement of the estate with his successor, a settlement made by an executor on his resignation as executor, but before the appointment of his successor, is not final and conclusive as to the successor.

Emmons v. Gordon, 28 S.W. 863, 125 Mo. 636.

Mo. 1895. Rev.St.1889, § 47, V.A.M.S. § 461.550, provides that an administrator who has been removed shall account for and deliver to his successor all moneys and property which came into his hands, at such time, and in such manner, as the court shall order. Section 48 recites that, after an administrator's letters are revoked, the court shall ascertain the amount of property in his hands, and enforce the order. Section 223 prescribes that every settlement shall be verified by the administrator's affidavit. *Held*, that the failure of an administrator de bonis non to except to a certain item in the account of his predecessor, who had been removed, did not entitle the latter to credit therefor; the filing of the exceptions not being required under the statutes.

In re Glover, 29 S.W. 982, 127 Mo. 153.

A settlement between an administrator who has been removed and his successor is not a final settlement of his accounts as administrator.

In re Glover, 29 S.W. 982, 127 Mo. 153.

Mo. 1900. An executor purchased land for the estate, and subsequently was removed by the devisees, and an administrator d. b. n. appointed. A final settlement was made between the executor and administrator, the devisees being represented by attorney, in which settlement the executor was not credited with the purchase of the land, but the purchase price was included in other debts to the estate for which execution was obtained against the executor and his sureties. *Held*, that the devisees and administrator were estopped to claim any interest in the land.

Bishop v. Chase, 56 S.W. 1080, 156 Mo. 158, 79 Am.St.Rep. 515.

⇐513 (6). Joint or several settlements by coexecutors or coadministrators.

For cases from other jurisdictions, see other Key Number Digests.

⇐513 (7). Effect as to pending actions.

Mo. 1887. An executor cannot properly make a final settlement of his accounts with the probate court while litigation is still pending against the estate; and, where he makes such a settlement for the purpose of thwarting the recovery of a judgment against the estate in a suit then pending, the settlement is in fraud of the court, and the pending suit may proceed and judgment be rendered against him notwithstanding the settlement.

Smiley v. Smiley's Ex'rs, 4 S.W. 443, 92 Mo. 105.

⇐513 (8). Effect as to jurisdiction of court and status of executor or administrator.

C.C.Mo. 1901. Where an order of distribution made by a probate court on final settlement by the administrator is ineffectual to bind the heirs by reason of a failure to give proper notice, the administrator is not thereby discharged, and the jurisdiction of the probate court over the property and the administrator continues, and is exclusive.

Scruggs v. Scruggs, 105 F. 28.

Mo. 1901. Where an executrix is not discharged on an accounting, but the estate is continued to enable her to carry out a power to sell real estate given in the will, the jurisdiction of the county court to compel an accounting by an administrator afterwards appointed on the removal of the executor cannot be defeated on the ground that such accounting terminated the administration, and that the subsequent removal and reappointment were void, and that the property is thus held as trustee, and not as administrator.

Francisco v. Wingfield, 61 S.W. 842, 161 Mo. 542.

Mo. 1924. A judgment confirming an executor's settlement as final and discharging him before a sale of land and payment of the proceeds to a designated legatee, as directed in the will, is void, and hence does not render the power of sale impossible of execution; the probate court, in which the administration is still pending, being vested with jurisdiction to fill the vacancy by appointing a suitable person designated as provided by the will or an administrator de bonis non with the will annexed.

Wyatt v. Stillman Institute, 260 S.W. 73, 303 Mo. 94.

Mo.App. 1916. Until the probate court has ordered the administrator of an estate discharged, the estate is not closed, and a final settlement therein is not a binding judgment, although approved by the court.

State ex rel. Noll v. Noll, 189 S.W. 582.

For references to other topics, see Descriptive-Word Index

⇐513 (9). Persons and matters concluded in general.

Final settlements of administrators in the probate court have the force and effect of judgments, and are conclusive as to all matters which were properly included in such settlements and necessarily involved in the final settlement.

Mo. 1891. State ex rel. Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo. 1894. Young v. Byrd, 28 S.W. 83, 124 Mo. 590, 46 Am.St.Rep. 461.

Mo.App. 1944. State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

Mo. 1845. A settlement made by an administrator has the force of a judgment.

Caldwell v. Lockridge, 9 Mo. 362.

Mo. 1864. An order of the county court, upon a final settlement of the account of an administrator, allowing a certain sum out of the assets for the maintenance and education of the intestate's infant children, is in the nature of a judgment, and conclusive upon the parties until reversed by proper proceedings for that purpose.

Barton v. Barton, 35 Mo. 158.

Mo. 1871. The decree of a surrogate having jurisdiction, settling the accounts of executors, has, until opened or set aside, the same conclusive effect as the judgment of any other court.

Murray v. Roberts, 48 Mo. 307.

Mo. 1879. There is but one exception to the rule of the conclusiveness which attends a final settlement, and that is, when an action is brought, either on the administrator's bond or otherwise, for waste or mismanagement, where the estate proves insolvent (1 Wag.St. p. 118, § 6), in which case the settlement is only to be held conclusive so far as the administrator has applied the assets pursuant to the apportionment made by the court for the payment of debts.

Woodworth v. Woodworth, 70 Mo. 601.

The final settlement of the estate of a decedent, made by the administrator with will annexed, has the force and effect of a judgment, and precludes any action on the bond of the former executor until such final settlement be impeached and set aside in an appropriate proceeding.

Woodworth v. Woodworth, 70 Mo. 601.

Mo. 1891. Time and opportunity are offered to all persons interested in the estate of persons deceased to contest the correctness of the administrator's account presented for final settlement in the probate court, with right of appeal from the judgment of that court finally adjusted that account between the administrator and the estate administered upon, under Rev.St.1879, c. 1, §§ 48–50, 238, 239, 282–284, 292, V.A.M.S. §§ 461.550 to 461.570, 465.160, 465.170, 465.200 to 465.220, 467.010. If creditors stand by and see the accounts thus finally adjusted by the probate court, their only right of action under section 287 of the same chapter is for assets of the estate wasted and not carried into the accounts thus settled in the probate court.

State ex rel Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo. 1894. A decree of a probate court, on an accounting by an administrator, that a fund in his hands belongs to certain persons, is a bar to a claim in another proceeding, by one who was a party to the accounting, that the fund belongs to other persons.

Young v. Byrd, 28 S.W. 83, 124 Mo. 590, 46 Am.St.Rep. 461.

Mo. 1895. The finding of the probate court, on final settlement of an executor, that a certain person was entitled to a certain sum as his distributive share of the estate, and its order that the same be paid him, as such share, do not prevent the executor interposing as a defense to an action therefor an assignment by such person of his interest to the executor before the final settlement.

State ex rel. Jones v. Jones, 33 S.W. 23, 131 Mo. 194.

Mo.App. 1877. Where no legal notice was given of the final settlement of the account of an administrator, the settlement could have the effect of an annual settlement only, and the order of distribution concluded no one, and did not have the effect of a judgment, and the administrator was still subject to the orders of the probate court.

Heitkamp v. Biedenstein, 3 Mo.App. 450.

Mo.App. 1881. Conclusiveness of settlement of administrator as to the correctness of the balance shown. See,

North v. Priest, 9 Mo.App. 586, memorandum.

Mo.App. 1894. In an action for an accounting against trustees under a will, who were also executors of the estate, an objection to the admission of the final settlement of the estate as evidence of any credits allowed by the probate court is properly overruled, where many of the credits were within the jurisdiction of the probate court, as the final settlement was conclusive as to them.

Lycan v. Miller, 56 Mo.App. 79.

Mo.App. 1894. A judgment of a probate court approving the final settlement of an administrator is as conclusive as a judg-

ment of any other court of record; and, in the absence of fraud inducing the judgment, equity affords no relief, and the only remedy the aggrieved party has is by appeal.

Cooper v. Duncan, 58 Mo.App. 5.

Mo.App. 1898. A settlement by an administrator is only conclusive on what is embraced within it, and is not an adjudication of moneys or other assets of the estate, which were never inventoried or otherwise brought into the administration by the administrator, and to which the attention of the probate court was not called.

State, to Use of Cardwell, v. Stuart, 74 Mo.App. 182.

Mo.App. 1910. In this state the final settlement of an administrator has the force and effect of a final judgment, and is binding on all parties interested until set aside.

Michie v. Grainger, 129 S.W. 983, 149 Mo.App. 301.

Mo.App. 1915. A final settlement and order of distribution in the probate court has the force of a judgment as to all matters necessarily involved in the settlement.

Crump v. Hart, 176 S.W. 1089, 189 Mo. App. 572.

Mo.App. 1916. The determination of the rights of a widow by the probate court on final settlement of her husband's administrator with her consent had the effect of a final judgment.

Wyatt v. Wilhite, 183 S.W. 1107, 192 Mo.App. 551.

Mo.App. 1937. Judgment of a probate court on a final settlement of an administrator is conclusive only as to matters therein embraced.

State ex rel. and to Use of Bearden v. American Surety Co. of New York, 104 S.W.2d 755, 231 Mo.App. 491.

Mo.App. 1944. A final settlement of an executor or administrator becomes conclusive upon lapse of term at which it was approved, as to all matters which were properly included or necessarily involved in making the settlement, but must be amended so as to show credit for allowance of an attorney's fee for defending a final settlement of executor or administrator, regardless whether the charge is allowed in circuit or probate court. Mo.R.S.A. § 220, V.A.M.S. § 465.100.

In re Mills' Estate, 183 S.W.2d 369, 238 Mo.App. 373.

Mo.App. 1948. Where decedent's war risk insurance was being paid to his wife as beneficiary during her lifetime, entry on back of final settlement of his executrix, stating "final settlement approved, judgment for balance $2,569.10, and discharged on filing of receipts", could not transfer to wife as sole legatee the intangible value of war risk policy, in view of statute requiring the balance of policy to be paid to insured's estate. World War Veterans' Act, § 303, 38 U.S.C.A. § 514.

State ex rel. Koontz v. Wells, 210 S.W. 2d 387, 240 Mo.App. 457.

⇐513 (10). Rights and liabilities of legatees and distributees.

Mo. 1884. Where expenditures, improperly made on real estate by the administrators and which caused a deficiency of assets to pay the debts, were included in a final settlement, the heirs could not prevent a sale of the land to satisfy the debts as long as such final settlement stood unimpeached.

Gardner v. Mathews, 81 Mo. 627, affirming 11 Mo.App. 269.

Mo. 1894. Where deceased's widow is administratrix, and dower has not been assigned her, the right to rents and profits of the land cannot be adjudicated in an action to set aside her final settlement for fraud, though they were not mentioned in such settlement.

Nelson v. Barnett, 27 S.W. 520, 123 Mo. 564.

Mo. 1953. Probate court judgment of final settlement of estate administration is conclusive on the distributees.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

Probate court judgment approving final settlement by executors was conclusive of proper administration as to widow who participated in proceeding, and, thus, in absence of claim of fraud, widow had no claim against trustees of estate created by husband's will, for equitable contribution to federal estate tax, allegedly paid in toto from personal property in which widow had interest, rather than in part from realty devised in trust. 26 U.S.C.A. §§ 810 et seq., 822(b), 826, and (b); V.A.M.S. § 462.280.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

Mo.App. 1915. Widow's acceptance of notes on final settlement in the estate of her deceased husband testate and her receipt for them as sole legatee under his will, *held* res judicata as to her half interest in the notes as against plaintiff's claiming under the will.

Crump v. Hart, 176 S.W. 1089, 189 Mo. App. 572.

Mo.App. 1920. Though defendant, who was appointed administrator of the estate

of plaintiff's brother, paid all the other heirs entitled to specific sums under his final settlement, taking receipts from them on which at final settlement he procured an order of discharge, plaintiff may by action recover the amount to which she was entitled.

Flynn v. Stoutimore, 226 S.W. 591.

⇐513 (11). Rights of creditors.

Mo. 1901. Where taxes were assessed against the estate of a decedent only, and the executor, after due notice, made his final settlement, and was discharged, he could not be held liable as executor for the taxes due by the estate.

State ex rel. Stotts v. Kenrick, 60 S.W. 1063, 159 Mo. 631.

⇐513 (12). Rights and liabilities of executor or administrator in general.

Mo. 1849. Where one is executor of a will, and also guardian of one of the devisees, after a settlement of the estate, he will be regarded as holding funds in the latter capacity, where there is nothing to show in what character he does hold them.

State, to Use of Jacobs, v. Hearst, 12 Mo. 365, 51 Am.Dec. 167.

Mo. 1857. Where an administrator, on a final settlement by his agent, is charged without his consent with a debt due the estate from the agent, and a balance found against him, although he has not received the debt, in an action by him, as administrator, against the agent therefor, the latter cannot insist that the debt is now due the administrator personally.

Shore's Adm'x v. Coons, 24 Mo. 553.

Mo.App. 1939. Where diamond rings were inventoried as belonging to deceased wife's estate but surviving husband instituted reclamation suit and probate court sustained husband's claim as owner, probate court by thereafter approving administratrix' settlement showing that she had sent the diamond rings to daughter of husband who had died during meantime did not validate administratrix' act, since court was without jurisdiction because rings were not part of the estate.

Manley v. Ryan, 126 S.W.2d 909, 235 Mo.App. 45.

Mo.App. 1945. Judgment of probate court approving final settlement and discharging defendant as administratrix of deceased person's estate closed administration and ended defendant's status as administratrix.

Foster v. Wright, 187 S.W.2d 974, 239 Mo.App. 386.

⇐513 (13). Mismanagement or illegal acts.

Where a curator was also administrator of the estate of the ward's father, the ward was not precluded, on the final settlement of the curator's accounts, from showing that the curator had received money belonging to the father's estate, with which he had not charged himself, either in the settlement of that estate or as curator, by the fact that the curator had finally settled his accounts as administrator.

Mo. 1880. In re Wood, 71 Mo. 623.

Mo.App. 1876. State, to Use of Wagenmann, v. Rosswaag, 3 Mo.App. 11.

Mo.App. 1876. State, to Use of Wagenmann v. Rosswaag, 3 Mo.App. 590, memorandum.

Mo. 1922. Final settlement filed by administrator de bonis non, which made no mention of land purchased by him with funds belonging to the estate and showed no rents or profits accruing therefrom, did not preclude persons entitled to the estate from thereafter establishing a constructive trust in the land, where there was no order of distribution for discharge, since the administrator de bonis non remained within the control and jurisdiction of the court notwithstanding such final settlement and was not released of liability as to assets undisturbed.

Stoff v. Schuetze, 240 S.W. 139, 293 Mo. 635.

Mo. 1947. Orders and judgment of probate court approving compromise settlement of putative widow's claims against decedent's estate made by administratrices and final settlement to revocation between retiring administratrices and successor executor embodying disbursement under compromise agreement was res judicata of issue as to propriety of such disbursement in action by executor for breach of administratrices' bond. Mo.R.S.A. §§ 48, 49, 213, V.A.M.S. §§ 461.550, 461.560, 465.010.

Boatmen's Nat. Bank of St. Louis v. Bolles, 202 S.W.2d 53, 356 Mo. 489.

Mo.App. 1881. Competency of administrator's last annual statement to show that while a judgment was pending on appeal he improvidently paid moneys to distributees, which, if properly charged to him, would leave enough in his hands to satisfy the order of the probate court. See,

North v. Priest, 9 Mo.App. 586, memorandum.

Mo.App. 1936. Executor's final settlement, approved by probate judge with knowledge of circuit court judgment against executor, *held* void and no legal barrier to classification of judgment as valid claim

against estate. Mo.St.Ann. §§ 185, 186, 189, 206, 231, pp. 115, 121, 134, 152, V.A.M.S. §§ 464.030, 464.040, 464.110, 464.140, 465.180.

State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

⇐513 (14). Mistakes and omissions.

Mo. 1894. The final settlement of an administrator is as conclusive as the judgment of any other court, and cannot be impeached, except on the ground of fraud in the very act of procuring the judgment; and the procuring of merely illegal allowances, or the omission of proper debits, in the account presented for a final settlement, will not render such settlement open to attack in the court of equity on the ground of fraud.

Nelson v. Barnett, 27 S.W. 520, 123 Mo. 564.

Mo.App. 1910. Where an administrator by mistake failed to pay certain notes against the estate, and so paid them himself, he could not make his error the basis of an independent action to enforce contribution from the beneficiaries after the settlement had been concluded, but to do so the settlement must first be set aside by a court of equity, or in a proper proceeding have it corrected.

Michie v. Grainger, 129 S.W. 983, 149 Mo.App. 301.

⇐513 (15). Assets unadministered or not accounted for.

Mo. 1894. The judgment of the probate court on the final settlement of the administrator's accounts is conclusive only as to matters actually adjudicated by the court, and matters not thus included may be adjudicated in an action to set aside the settlement on the ground of fraud.

Nelson v. Barnett, 27 S.W. 520, 123 Mo. 564.

Mo. 1898. A final judicial settlement of an executrix's account does not conclude remaindermen from seeking to charge her estate thereafter for a note for which she did not account, which was received by her as particular life tenant of the estate of which she was executrix, on the discharge out of the funds of the estate of a collateral charge on it, because the action seeks to enforce a trust not embraced in the matters passed on by the probate court.

Bramell v. Adams, 47 S.W. 931, 146 Mo. 70.

Mo. 1901. Where, after an administrator has been duly discharged, assets belonging to the estate, and which have not been administered, are discovered by an unpaid creditor, the former administration cannot be revived, but the court, on proper application, will appoint an administrator de bonis non.

Ratliff v. Magee, 65 S.W. 713, 165 Mo. 461.

Mo.App. 1932. Where sole executor had been discharged, circuit court ten years after life tenant's death had jurisdiction to enforce testamentary provision directing sale of land and distribution of proceeds, notwithstanding subsequent appointment of administrator de bonis non.

Rawlings v. Rawlings, 45 S.W.2d 539, 226 Mo.App. 688, transferred 39 S.W. 2d 367, reversed 58 S.W.2d 735, 332 Mo. 503.

Mo.App. 1945. Where order and judgment discharging defendant as administratrix was properly made and there was no claim or other litigation affecting the estate pending in any court at time when notice of intended final settlement was published, final settlement was made and administratrix was discharged, the former administratrix could not be sued as administratrix 11 months after the discharge, even though suit was commenced within 12 months after reversal and remand of cause for trial on merits in action, commenced while such party was administratrix.

Foster v. Wright, 187 S.W.2d 974, 239 Mo.App. 386.

⇐514. —— Partial account.

Annual settlements are prima facie evidence in favor of the administrator.

Mo. 1889. Myers v. Myers, 11 S.W. 617, 98 Mo. 262.

Mo. 1898. Clarke v. Sinks, 46 S.W. 199, 144 Mo. 448.

Mo.App. 1902. In re Ansley's Estate, 68 S.W. 609, 95 Mo.App. 332.

Mo. 1864. The annual settlement of accounts required of an executor or administrator by the statutes is not conclusive upon the parties; but, at a final settlement, all the parties interested having notice to appear, they may suggest and show errors in previous statements.

Picot v. O'Fallon Ex'r of Biddle, 35 Mo. 29, 86 Am.Dec. 134.

Mo. 1874. Annual settlements up to the time of making final settlement by the administrator are not final or conclusive on the parties interested, but only afford prima facie evidence of the facts therein contained.

State ex rel. Public Adm'r of Daviess County v. Lankford, 55 Mo. 564.

Annual settlements of executors and administrators are not conclusive, but are

open and subject to review and correction at the final settlement.

Mo. 1876. In re Davis, 62 Mo. 450.

Mo. 1880. Ritchey v. Withers, 72 Mo. 556.

Mo. 1876. That an administrator repeatedly charged himself with worthless notes in his annual accounts did not preclude him from claiming credit therefor in his final settlement.

Williams v. Petticrew's Heirs, 62 Mo. 460.

Mo. 1881. An annual settlement of an administrator has the force and effect of a judgment, but is only prima facie evidence that such statement of the act is correct, and is open to collateral attack.

West v. West's Adm'r, 75 Mo. 204.

Mo. 1884. Payments made to distributees by an administrator and accounted for in annual settlements have no conclusive effect against a creditor whose claim was allowed before the annual settlements were made.

North v. Priest, 81 Mo. 561.

Where an administrator has distributed the funds of the estate without paying an allowed demand, the creditor is not debarred from relief against the administrator on the ground that payments to the distributees were contained in annual settlements, since such settlements are only interlocutory steps in the settlement of the estate, and all objections to allowances therein may be made on the final settlement.

North v. Priest, 81 Mo. 561.

Mo. 1892. The mere fact that an administrator has charged himself in an annual settlement with a fund that he has received as trustee for the heirs, and not by virtue of his official character, and to which he would and could have no legal right as administrator, will not estop him from asking to strike the same from his accounts on final settlement, nor prevent the probate court from allowing him to do so.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo. 1929. Probate court's failure to require executors to account for interest at each settlement *held* not final so as to preclude action thereon on final settlement. Rev.St.1919, §§ 222, 223, V.A.M.S. §§ 462.270, 465.080.

Enright v. Sedalia Trust Co., 20 S.W.2d 517, 323 Mo. 1043.

Mo.App. 1890. A father and son were copartners. They executed notes as joint makers. On the father's death the son became administrator. The partnership estate was administered through the individual estate, and the son, as administrator, was allowed in his first annual settlement a credit for the payment of notes executed by his father and himself as joint makers. *Held*, that on a final settlement of the father's estate the county court, under the authority of Const. art. 6, § 34, V.A.M.S. was empowered to correct the error in allowing the administrator credit for the payment of such notes on objection being made by the heirs and distributees of the estate.

McClelland v. McClelland, 42 Mo.App. 32.

The decision of the court on a final settlement of an administrator's account that the administrator was entitled to a credit for only one-half of an allowance allowed in his first annual settlement did not involve an attack on the validity of the allowance in the first annual settlement.

McClelland v. McClelland, 42 Mo.App. 32.

The court has a right on the final settlement of an administrator's accounts to rectify all errors or mistakes that appear in prior accounts and settlements on the application of the heirs and distributees claiming that the administrator had procured a credit in prior accounts for a greater amount than he was entitled to.

McClelland v. McClelland, 42 Mo.App. 32.

Mo.App. 1902. Error in approval of an item in an annual settlement by an administrator will not prevent its rejection on final settlement.

Springfield Grocer Co. v. Walton, 69 S. W. 477, 95 Mo.App. 526.

Mo.App. 1936. Executor's annual settlement is not a judgment, and probate court may correct all errors therein on final settlement. Mo.St.Ann. § 231, p. 152, V.A.M.S. § 465.180.

State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

⇐515. Private accounting and settlement.

Mo. 1859. Where slaves were devised to the widow for life, remainder in fee to the children, and the executor, being desirous to close up the estate, induced the parties to consent to a division among themselves, which was made, but without the communication by the executor to the children of the condition upon which the widow's consent thereto was obtained, viz., that she might retake the property when so disposed, it was *held* that the executor, if he was the agent of the widow, was so with only limited powers, and that, if the heirs were misled by the concealment on his part of the condition, it was

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without any fault on the part of the widow, and that she might retake the slaves which had been set off to one of the children, although the equality of the partition would be thereby defeated.

McCune v. McCune, 29 Mo. 117.

⇐516. Actions to open or set aside settlement.

⇐516 (1). Nature and scope of remedy.

Mo. 1851. A settlement made by an administrator in the county court, which is fraudulent in law, will be set aside in chancery.

Stong v. Wilkson, 14 Mo. 116.

Mo. 1902. A voluntary dismissal of an appeal to the circuit court from a judgment of the probate court approving an administrator's final settlement is no bar to a suit in equity to surcharge and falsify the settlement.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo. 1953. In absence of fraud inducing probate court's judgment of final settlement of administration of an estate, equity is not available for relief, the only remedy to aggrieved parties being by appeal to correct errors unaccompanied by fraud.

Saracino v. St. Louis Union Trust Co., 254 S.W.2d 600.

Mo.App. 1894. A judgment of a probate court approving the final settlement of an administrator is as conclusive as a judgment of any other court of record, and, in the absence of fraud inducing the judgment, equity affords no relief, and the only remedy the aggrieved party has is by appeal.

Cooper v. Duncan, 58 Mo.App. 5.

Mo.App. 1930. That no affidavit stating administrator's demand against estate was improperly allowed was filed within four months after final settlement does not oust equity of jurisdiction to set aside allowance for fraud. Rev.St.1919, § 211, V.A.M.S. § 464.310.

Kiel v. Osterwald, 32 S.W.2d 778.

⇐516(2). Grounds of action.

C.C.Mo. 1882. An order of a probate court approving the final report of an administrator and discharging him from his trust may be attacked and set aside in a court of equity upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands, by virtue of his office.

Ridenbaugh v. Burnes, 14 F. 93.

Mo. 1876. The settlement of an administrator will not be set aside in an action in the circuit court, in the absence of fraud, on account of mere illegal allowances which might have been corrected in the probate court or on appeal from its judgment.

Sheetz v. Kirtley, 62 Mo. 417.

Mo. 1885. A suit in equity to set aside the final settlement of an administrator will not lie on the ground that the administrator gave no notice of such settlement as required by statute, since, if that were true, the settlement was a nullity, and plaintiff had an adequate remedy at law.

Lenox v. Harrison, 88 Mo. 491.

Mo. 1897. The probate judge, when told by the attorney for the heirs, prior to the filing of the administrator's final settlement, that he desired to contest the same, informed him that when the settlement was filed, if it was fair on its face, he would approve it, and that the heirs could then appeal. The settlement was thereafter approved without giving the heirs opportunity to be heard. *Held*, that the judgment would be set aside for fraud and collusion between the judge and the administrator.

Baldwin v. Davidson, 40 S.W. 765, 139 Mo. 118, 61 Am.St.Rep. 460.

Mo. 1901. Where defendant made her final settlement as administratrix of an estate in November, 1892, and subsequently taxes were levied against the estate which could not have been paid prior to September, 1893, a bill to set aside the final settlement for defendant's fraud in not paying the taxes was properly dismissed.

State ex rel. Bates v. Shaw, 63 S.W. 371, 163 Mo. 191.

Mo. 1901. A creditor of the estate cannot maintain a suit to vacate the final settlement and discharge of the administrator, though he has discovered assets of the estate which were not administered; for such judgment is res judicata.

Ratliff v. Magee, 65 S.W. 713, 165 Mo. 461.

Mo. 1902. The mere purchase by an administrator of claims against the estate, though improper, is not fraud of such a character as will authorize a setting aside of his final settlement, in which he has only credited himself with the sums expended in the purchase of such claims, as such settlement will only be set aside for fraud in procuring the settlement, and not for a mere irregularity not showing fraud.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo.App. 1879. Equity will not set aside the final settlement of an executor for fraud, on the ground that by proper diligence he

might have collected moneys which he had failed so to collect.

James v. Withinton, 7 Mo.App. 575, memorandum.

Mo.App. 1909. The fraud essential to be shown to vacate a judgment of the probate court finally settling an estate and discharging the administrator need not be positive and actual with intent to cheat and wrong those interested, but may consist of an improper act or concealment by the administrator operating as a fraud and resulting in a loss to the interested parties, whatever the motive may be.

Mueller v. Grunker, 123 S.W. 469, 145 Mo.App. 611.

Mo.App. 1916. Where allowance of commission to an administrator on approval of his final settlement was induced by negligence of plaintiff, there was no mistake or fraud entitling him to equitable relief.

Einstein v. Strother, 182 S.W. 122.

Mistake in administrator's right to commission on note collected for the estate, though belonging to another, *held* a mistake of law, for the correction of which no action would lie after the term in which administrator's final account was approved.

Einstein v. Strother, 182 S.W. 122.

Any fraud in allowance of commission to an administrator on his final settlement *held* not fraud in procuring the settlement so as to afford ground for setting it aside.

Einstein v. Strother, 182 S.W. 122.

⇐516 (3). Persons entitled to sue.

For cases from other jurisdictions, see other Key Number Digests.

⇐516 (4). Jurisdiction.

Mo. 1845. The eighth section of the first article of the act establishing courts of record and prescribing their powers and duties (Rev.Code, p. 155) confers on a court of chancery the power to examine the settlements of administrators.

Berry v. Robinson, 9 Mo. 276.

⇐516(5). Limitations and laches.

Mo. 1883. In a suit by residuary legatees under a will to set aside for fraud the executor's annual and final settlements, it appeared that the oldest of the plaintiffs obtained his majority in May, 1872; that the first suit was brought in January, 1877; that a voluntary nonsuit was taken in June, 1878; and that the present suit was commenced in September, 1878. *Held*, that the present suit was not barred by limitations.

Houts v. Shepherd, 79 Mo. 141.

Mo.App. 1888. In an action by the distributees of an estate to set aside the final settlement of the administrator, where it appears that the statute of limitations is a defense against all of plaintiffs except one who had been under disability, the defense should be disregarded as to the distributive share of that plaintiff, and recognized as to the others.

Phillips v. Broughton, 30 Mo.App. 148.

⇐516 (6). Parties, pleading, and evidence.

Mo. 1871. Fraud in an administrator's final settlement will not be presumed from mere obscurity or apparent error, more especially when, from lapse of time, it has become impossible to clear up the obscurity or explain the error.

Picot v. Bates, 47 Mo. 390.

Mo. 1872. The fact that an administrator de bonis non is the proper person to pursue the estate in the hands of his predecessor does not authorize the heirs to join both administrators as defendants in an action to set aside their settlements on the ground of fraud.

Kerrin v. Roberson, 49 Mo. 252.

Mo. 1883. In a suit by residuary legatees under a will to set aside for fraud the annual and final settlements of the executor, and praying for a true accounting of the assets of the testator, evidence examined, and *held* to show that the executor willfully omitted to charge himself with assets which he knew came to his hands, and for which he knew he had not accounted, warranting the court in setting aside such settlements, because such conduct constituted a violation of that good faith which the law imposes on trustees.

Houts v. Shepherd, 79 Mo. 141.

In a suit by residuary legatees under a will to set aside for fraud the executor's annual and final settlements, evidence examined, and *held* to show that a release of the legatees procured by the executor was procured by fraud, rendering the release invalid, so as not to prevent the legatees from maintaining the suit.

Houts v. Shepherd, 79 Mo. 141.

Mo. 1902. The fact that the probate court, on being informed of a contemplated contest of an administrator's account, states that it will be approved if regular on its face, and that the contestant may appeal, does not show collusion between the judge and administrator, authorizing the setting aside of the judgment of the probate court on evidence by the administrator that he had no knowledge of the proposed contest, and of the judge and

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attorney for the contestants that they did not inform the administrator thereof.

Baldwin v. Dalton, 67 S.W. 599, 168 Mo. 20.

Mo.App. 1877. A proceeding in equity to set aside the final settlement of an administrator and subject the real estate of the deceased to the payment of an alleged demand was defective in parties defendant, where one who took a third of the real estate under the will was not made a party.

Heitkamp v. Biedenstein, 3 Mo.App. 450.

Mo.App. 1887. In an action brought to vacate, surcharge, and falsify the final settlement of a surviving partner, *held*, that the proof failed to show any fraudulent concealment of assets.

Standard v. Lacks, 25 Mo.App. 64.

Mo.App. 1891. In order to authorize the setting aside of the final settlement of an administrator, the petition must charge that the allowance complained of was procured by fraud and false means, unjustly, to the injury of the estate and parties interested; and mere allegations that the administrator was improperly credited with a certain sum, and that the giving by the administrator of a certain receipt operated in fraud of plaintiff's right, are insufficient.

Crowley v. McCrary, 45 Mo.App. 350.

Mo.App. 1916. Allegations of petition, in suit in equity to set aside probate judgment approving defendant's final settlement as administrator, *held* not to show that plaintiff availed himself of adequate remedies at law.

Einstein v. Strother, 182 S.W. 122.

Mo.App. 1930. Evidence *held* not to show fraud in allowing administrator $200 for services rendered incompetent's estate.

Kiel v. Osterwald, 32 S.W.2d 778.

⇐516 (7). Trial and determination.

Mo. 1899. A finding that a final settlement by an executor was acquiesced in by a specific legatee, "under a misapprehension of fact," is erroneous, where the complaint seeking to have the settlement disregarded only claims that it was founded upon "a verbal agreement" between the legatee and the executor, which had not been lived up to.

Smith v. Hauger, 51 S.W. 1052, 150 Mo. 437.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⇐517. Foreign appointment.

Mo. 1859. Letters testamentary, granted to an executor in one state, have no extraterritorial force.

Naylor's Adm'r v. Moffatt, 29 Mo. 126.

Mo. 1892. An administrator derives his authority to take and administer the assets of his intestate from the laws of the state in which he is appointed, and these laws of necessity have no extraterritorial sanction.

McPike v. McPike, 20 S.W. 12, 111 Mo. 216.

Mo.App. 1936. Administration in one state is in no way impaired, abridged, or affected by previous or subsequent grant of administration in another state, since administration in each state is independent of local jurisdiction of state in which it is granted and limited to chattels having particular situs in such state.

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

Letters testamentary or letters of administration have no extraterritorial force, and powers conferred thereby cannot extend beyond boundaries of state in which they were granted.

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

⇐518. Ancillary appointment.

⇐518 (1). In general.

C.C.A.Mo. 1919. Where the property of a testator has been vested in the devisee by the probate court of the state where testator resided and where the will was probated, a part of the property situated in another state cannot be subjected to further administration proceedings therein.

Slater v. Thompson, 255 F. 768, 167 C.C.A. 112.

Mo. 1851. The domicile of the deceased determines whether or not his assets shall be transferred from one state to another for administration. In whatever state the domicile may have been, the administration there granted is the principal one, and that in any other state is ancillary, and priority in administration has no effect upon the rule.

Spraddling v. Pipkin, 15 Mo. 118.

Mo. 1916. Probate court *held* justified in finding that executor named in will of Ohio decedent, who qualified in such state, but later resigned generally, renounced all right to act as executor in Missouri.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412, Ann.Cas. 1918D, 454.

Mo. 1919. In view of Const. art. 6, §§ 1, 34, V.A.M.S. and Rev.St.1879, §§ 1023, 1176, Rev.St.1889, §§ 3225, 3397, V.A.M.S. §§ 476.010, 481.020, where public administrator of certain county representing estate being administered in another state, secured judgment against debtor of estate and after making

final settlement was discharged, appointment of an ancillary administrator de bonis non to represent such estate by probate court of such county, was valid.

Wright v. Hetherlin, 209 S.W. 871, 277 Mo. 99.

Mo.App. 1904. Nonresident executors are not authorized to act in this state, either in the collection of debts or in disposing of the property in this state, but, under Rev.St. 1899, § 254, V.A.M.S. § 466.080, providing for the disposition, according to the will, of property in this state belonging to a nonresident who dies testate, and section 11, providing for the appointment of an administrator with the will annexed when the executors are disqualified, letters testamentary with the will annexed should be issued to a person qualified to administer in this state, although the estate is in process of administration in the state of testator's residence.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1906. Where intestate, in his lifetime, recovered judgment against defendant in another state, after which defendant removed to Missouri, the situs of the debt evidenced by the judgment was in the county of defendant's residence in Missouri, and not where the judgment was recovered and recorded, authorizing ancillary administration on intestate's estate in such county for the purpose of collecting the judgment.

Miller v. Hoover, 97 S.W. 210, 121 Mo. App. 568.

Mo.App. 1907. A deed executed by a resident of Ohio was not delivered until after his death, when in order to make the title good, his children executed another deed to a third party who conveyed to the purchaser on payment of the price, and after paying a mortgage on the property returned with the balance of the proceeds to this state. While on a visit here decedent, who had incurred debts for medical attendance, left two trunks and a small valise, the contents of which were not shown, and a small sum of money. *Held*, that an administrator on decedent's estate was properly appointed in this state with authority to collect the balance of the purchase money from such third party.

Turner v. Campbell, 101 S.W. 119, 124 Mo.App. 133.

Mo.App. 1936. Administration in state where person was domiciled at time of death is deemed principal or primary administration and is ordinarily termed "domiciliary administration," and administration in state other than where decedent is domiciled where he has property is termed "ancillary" or "auxiliary."

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

⇐518(2). Appointment as dependent on assets or domiciliary appointment.

D.C.Mo. 1950. Under the statute providing that no letters of administration shall be granted in the estate of any non-resident decedent as to any shares of stock or choses in action, ancillary administrator could not be appointed after death of a non-resident to bring an action based on a contract to recover certificates representing shares of stock, or to recover shares of stock. Mo.R.S.A. § 272, V.A.M.S. § 465.200.

Becker v. Buder, 88 F.Supp. 616, affirmed 185 F.2d 311.

Mo.App. 1916. Goods once in legal possession of executrix duly appointed in Texas could not afterward be affected by administration granted in Missouri to which they were removed for purposes of sale, so that the Missouri court had no authority to appoint an ancillary administrator over them.

Hill v. Barton, 188 S.W. 1105, 194 Mo. App. 325.

Where Texas executrix shipped cattle of estate into Missouri for sale, creditor of estate in Missouri could not have ancillary administration thereon and the property taken away from executrix to satisfy his demand.

Hill v. Barton, 188 S.W. 1105, 194 Mo. App. 325.

Mo.App. 1927. Probate court cannot appoint public administrator ancillary administrator of nonresident testator, where estate has no assets in county. V.A.M.S. § 461.820.

In re White's Estate, 295 S.W. 504, 221 Mo.App. 984.

"Situs of property" of stock of domestic corporation owned by estate of nonresident deceased is in county where corporation has place of business.

In re White's Estate, 295 S.W. 504, 221 Mo.App. 984.

⇐518(3). Persons entitled to appointment.

Mo. 1916. Executor, named in will of Ohio decedent who resigned generally after qualifying in Ohio, was not entitled to appointment as executor in Missouri after the probate court, acting on his renunciation, had appointed an administrator in his stead.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.

⇐518(4). Proceedings for appointment.

For cases from other jurisdictions, see other Key Number Digests.

⇐518(5). Operation and effect.

Mo. 1916. Executor duly qualified in testator's domiciliary jurisdiction succeeds to

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title of all of testator's estate wherever situated, and continues to hold until an ancillary executor is appointed in a foreign jurisdiction, when the title of the estate in the ancillary jurisdiction vests in the latter.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.

Mo. 1941. The validity of appointment of ancillary administrator by probate court could not be questioned where several cases had been tried without raising such question and parties had acted on assumption that appointment was valid, and to invalidate appointment might seriously affect the validity of judgments in cases tried.

In re Franz' Estate, 145 S.W.2d 400, 346 Mo. 1149.

Mo.App. 1904. The fact that there is nothing to warrant an order authorizing an ancillary administrator, appointed to collect debts, to take charge of real property in the state, renders such order subject to attack on motion, but the invalidity of the same has no effect on the grant of the letters.

Stevens v. Larwill, 84 S.W. 113, 110 Mo. App. 140.

Mo.App. 1936. In state in which authority of executor is deduced from appointment by court, executor derives title to office from law rather than will, and hence there can be no privity between executor appointed in one state and executor appointed in another state.

First Nat. Bank v. Blessing, 98 S.W.2d 149, 231 Mo.App. 288.

⇐518(6). Discharge and removal.

Mo. 1916. An executor's renouncement or resignation in the domiciliary jurisdiction of testator terminates his right to act in other jurisdictions under ancillary letters.

State ex rel. Abercrombie v. Holtcamp, 185 S.W. 201, 267 Mo. 412.

⇐519. Collection and disposition of assets.

⇐519 (1). In general.

D.C.Mo. 1950. Under the statute providing that no letters of administration shall be granted in the estate of any decedent nonresident as to any shares of stock or choses in action except upon application of a creditor within the state, obligors under contract upon which foreign executor of non-resident decedent based action for recovery of certificates representing shares of stock or shares of stock, could on demand deliver specified assets to foreign domiciliary executor without fear of liability for local claims. Mo.R.S.A. § 272, V.A.M.S. § 466.010.

Becker v. Buder, 88 F.Supp. 616, affirmed 185 F.2d 311.

Under the statute providing for administration of estates of non-resident decedents, and providing that unless ancillary administrator has made demands for transfer upon obligor of or upon shares of stock or choses of action, such shares or choses "may" be transferred to or in the name of the domiciliary administrator or any person entitled thereto, word "may" is mandatory. Mo.R.S.A. § 272, V.A.M.S. § 466.010.

Becker v. Buder, 88 F.Supp. 616, affirmed 185 F.2d 311.

Mo. 1846. Where an administratrix obtained insurance in another state than that in which her letters of administration were granted, on the property of the estate of her intestate, and a loss occurred, it was *held* that she was entitled to the insurance money against one who had taken out administration in the state where the insurance was effected.

Abbott v. Miller, 10 Mo. 141.

Mo. 1850. An administrator appointed under the laws of another state cannot indorse a promissory note made payable to the intestate by a citizen of this state, so as to give the indorsee a right of action here in his own name.

McCarty v. Hall, 13 Mo. 480.

Mo. 1851. An administrator appointed by the court within whose jurisdiction a decedent was at his death domiciled is entitled to receive from the administrator appointed in another jurisdiction, in which there are assets, what may remain after paying the debts of the estate therein.

Spraddling v. Pipkin, 15 Mo. 118.

Mo. 1859. An administrator duly appointed by a county court of this state is entitled to the possession of the personal property of the deceased found here, and his right to sue for such possession is exclusive of the foreign executor, distributees, and all others.

Naylor's Adm'r v. Moffatt, 29 Mo. 126.

Mo. 1920. A foreign administrator has no title to nor right to collect or receipt for a note of citizens of the state and secured upon property in the state.

Hartnett v. Langan, 222 S.W. 403, 282 Mo. 471.

Mo. 1936. Letters of administration give administratrices no power to function under such letters beyond territorial limits of Missouri, in absence of authorizing statutes in other states.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Mo.App. 1909. A foreign domiciliary administrator is without title to personalty in the state.

Crohn v. Clay County State Bank, 118 S.W. 498, 137 Mo.App. 712.

A debtor paying the debt to the foreign domiciliary administrator of his creditor will not be protected as against the resident administrator on the ground that the money has gone where it must in the end go, as such foreign administrator is wholly without authority or title to receive payment.

Crohn v. Clay County State Bank, 118 S. W. 498, 137 Mo.App. 712.

Nor will he be protected on the ground that the resident administrator is a trustee for the heirs and the foreign administrator, for the resident creditors have a superior right to heirs.

Crohn v. Clay County State Bank, 118 S.W. 498, 137 Mo.App. 712.

Payment of a debt to a foreign domiciliary administrator of the creditor is no defense against the resident administrator, notwithstanding payment was made before the latter's appointment.

Crohn v. Clay County State Bank, 118 S.W. 498, 137 Mo.App. 712.

Mo.App. 1913. Where a citizen of Missouri died owning property and owing debts in Arkansas, a special administrator appointed in Arkansas, who acquired possession of intestate's property in that state, did so only for the payment of debts and had acquired no jurisdiction of assets beyond the state.

First Nat. Bank v. Dowdy, 161 S.W. 859, 175 Mo.App. 478.

Where an administrator is appointed by the courts of one state, such courts reserve to themselves full and conclusive jurisdiction over the assets of the estate within the limits of that state.

First Nat. Bank v. Dowdy, 161 S.W. 859, 175 Mo.App. 478.

Mo.App. 1916. Title of Texas administratrix which Missouri law will recognize in any event is title arising from fact of her possession of decedent's property previous to and at time it came into state, and not that arising from validity of her appointment.

Hill v. Barton, 188 S.W. 1105, 194 Mo. App. 325.

Mo.App. 1918. Where intestate has interest in land situated in a state other than that in which his administratrix is appointed, the only means whereby such land can be disposed of in administration is by an ancillary administration in that state according to the law thereof.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

Mo.App. 1920. Title to personalty vests in the domestic administrator, where the owner was a nonresident at the time of his death.

Conqueror Trust Co. v. Craig, 218 S.W. 972, 204 Mo.App. 650.

Mo.App. 1946. Debts due from Missouri debtor to nonresident decedent are assets to be administered in Missouri.

Pinet v. Pinet, 191 S.W.2d 362, 239 Mo. App. 500.

⇐519(2). Sale, assignment, or pledge of assets.

Mo. 1851. If the record shows a case where, on application, a transfer of assets would have been ordered from one state to another, a transfer made by the administrator without such order completes his administration, and vests the title thereto in the administrator appointed in the state to which the transfer is made, so that an administrator de bonis non appointed in the state from which they were removed cannot claim them as unadministered assets.

Spraddling v. Pipkin, 15 Mo. 118.

Mo.App. 1889. Under Rev.St.1879, § 129, V.A.M.S. § 462.280, lands in Missouri cannot be leased by a foreign administrator, but should be leased by an administrator in Missouri.

Crockett v. Althouse, 35 Mo.App. 404.

⇐520-522.

See Analysis for scope of Key Numbers. For cases from other jurisdictions, see other Key Number Digests.

⇐523. Distribution of estate.

Mo.App. 1946. An ancillary administrator who had been appointed in Kansas where claim had been allowed against estate, and who had delivered estate funds to domiciliary administratrix representing that estate had no other assets for payment of a first claim allowed in Missouri, but not using funds for such purpose, did not have such an adequate remedy at law as required that his demand be filed in probate court, but had an equitable cause of action in circuit court to impress a trust on such funds.

Hedrick v. Wright, 191 S.W.2d 372, 239 Mo.App. 488.

⇐524. Actions by foreign executors or administrators.

⇐524(1). Rights of action and defenses.

C.C.A.Mo. 1948. A foreign executor or administrator may not sue in Missouri courts in his representative capacity for benefit of the estate, and such disqualification is appli-

For later cases see same Topic and Key Number in Pocket Parts

cable in a suit brought in federal court in Missouri based on diversity of citizenship.
Turner v. Alton Banking & Trust Co., 166 F.2d 305.

Although Missouri does not recognize any right in foreign representative to sue in that capacity in its courts for benefit of a decedent's estate, it allows him, where he has reduced a claim of the estate to judgment in state of his appointment, to treat the judgment, in view of the merger of original cause of action, as his own personal effect and to sue on it in the courts of Missouri in his individual capacity.
Turner v. Alton Banking & Trust Co., 166 F.2d 305.

A foreign representative, in suing in Missouri court on a judgment obtained in state of his appointment, has an individual status only and is simply a personal suitor, and hence, he comes into court on same basis as any other individual suitor.
Turner v. Alton Banking & Trust Co., 166 F.2d 305.

C.A.Mo. 1951. Under Missouri law, a foreign executor is without capacity to sue. Mo.R.S.A. § 272, V.A.M.S. § 466.010.
Buder v. Becker, 185 F.2d 311.

D.C.Mo. 1950. Under Missouri statute preventing local administration of shares of stock unless a resident creditor or ancillary administrator shows that other local assets of decedent are not sufficient to discharge debts and providing that unless such showing is made within six months of the granting or refusal of letters at decedent's domicile, or of the death of decedent, such personalty may be transferred to domiciliary executor administrator, foreign executor was entitled to maintain action in respect of shares of stock purchased by decedent, where more than six months had elapsed since grant of letters at decedent's domicile and no application for ancillary letters had been made. Mo.R.S.A. § 272, V.A.M.S. § 466.010.
Becker v. Buder, 88 F.Supp. 609, motion overruled 88 F.Supp. 616, 185 F.2d 311.

D.C.Mo. 1953. A foreign administrator may not sue in Missouri courts in his representative capacity for the benefit of the estate.
McKeen v. Union Pac. R. Co., 111 F.Supp. 876.

It is well settled that an executor or administrator cannot, as such, maintain a suit in one state by virtue of letters granted in another.
Mo. 1859. Naylor's Adm'r v. Moffatt, 29 Mo. 126.
Mo. 1883. May v. Burk, 80 Mo. 675.
Mo.App. 1898. Wolf v. Sun Ins. Co., 75 Mo.App. 306.
Mo. 1906. Miller v. Hoover, 97 S.W. 210, 121 Mo.App. 568.

Mo. 1873. Under Wag.St. p. 115, § 24, permitting a decedent's personal estate to be disposed of according to the laws of the state of which he was an inhabitant, an action will lie in Missouri brought by an executrix and devisee in her own right, after final settlement, on a claim due the estate by a defendant residing there, although the estate, having no debts in Missouri, was not probated there.
Morton v. Hatch, 54 Mo. 408.

Mo. 1891. A foreign administrator, who has obtained judgment in his own name in the state in which he was appointed upon a debt due to him as administrator, may bring suit on such judgment in Missouri, in his own name, as the trustee of an express trust.
Tittman v. Thornton, 17 S.W. 979, 107 Mo. 500, 16 L.R.A. 410.

Mo. 1924. Generally an administrator cannot sue in his representative capacity in state other than that in which he was appointed, in absence of an authorizing statute in state where he sues since letters of administration have no extraterritorial force, and since to permit such suit might result in diversion of local assets to injury of local creditors.
Wells v. Davis, 261 S.W. 58, 303 Mo. 388.

Mo. 1936. Generally, executor or administrator cannot prosecute cause in foreign jurisdiction in absence of authorizing statute in such foreign jurisdiction.
In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Administrator or executor appointed in one state cannot sue in federal court in another state.
In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Mo. 1940. Generally, an administrator cannot sue in his representative capacity in a state other than that in which he was appointed, in absence of authorizing statute in state where he sues, under the principle that letters of administration have no extraterritorial force, and the principle that a foreign administrator might exhaust or divert local assets to the injury of local creditors. Mo. St.Ann. § 706, p. 920, V.A.M.S. § 507.020.
Demattei v. Missouri-Kansas-Texas R. Co., 139 S.W.2d 504, 345 Mo. 1136.

To permit a foreign executor or administrator to have a recovery which is not to be administered at all is not giving extraterrito-

rial effect to his letters. Mo.St.Ann. § 706, p. 920, V.A.M.S. § 507.020.

Demattei v. Missouri-Kansas-Texas R. Co., 139 S.W.2d 504, 345 Mo. 1136.

Mo.App. 1877. Where the probate court in Missouri ordered an administrator appointed by that court to pay to the executor of the decedent in Massachusetts the balance found due the estate, the foreign executor can sue in Missouri on the administrator's bond.

State, to Use of Minot, v. Kaime, 4 Mo. App. 479.

Mo.App. 1898. Though a foreign administrator cannot as such maintain an action in this state, he may sue in his own name on a contract made with him since the death of his intestate.

Wolf v. Sun Ins. Co., 75 Mo.App. 306.

Though an objection to a foreign administrator's right to sue as such in this state on a policy of insurance is nullified by the fact that he was recognized in the policy as the administrator to whom it was payable, this could not be construed as recognizing him under the laws of any particular state, and it does not follow that he was administrator in Missouri, or that suit could be brought in this state.

Wolf v. Sun Ins. Co., 75 Mo.App. 306.

Mo.App. 1906. Where an administrator recovers judgment against a debtor of the estate and the debtor thereafter removes to Missouri, the foreign administrator may sue in his own name on such judgment in Missouri.

Miller v. Hoover, 97 S.W. 210, 121 Mo. App. 568.

Mo.App. 1946. A foreign administrator cannot maintain an action on note given by Missouri resident to administrator's intestate, nor can administrator indorse such note to third person so as to give indorsee a right of action in his own name.

Pinet v. Pinet, 191 S.W.2d 362, 239 Mo. App. 500.

⇐524 (2). Conditions precedent.

For cases from other jurisdictions, see other Key Number Digests.

⇐524 (3). Proceedings.

C.C.A.Mo. 1948. In suit brought by a foreign executor or administrator in Missouri court on a judgment obtained in state of his appointment, court has right to treat styling of plaintiff as executor or administrator as mere descriptive surplusage.

Turner v. Alton Banking & Trust Co., 166 F.2d 305.

Mo. 1894. The objection that a foreign administrator cannot maintain an action is waived by failure to take it at the proper time and in the proper manner.

Gregory v. McCormick, 25 S.W. 565, 120 Mo. 657.

⇐525. Actions against foreign executors or administrators.

C.C.Mo. 1901. An administrator appointed by a court of one state is not subject to an action in a court of another state or jurisdiction by an heir to establish his right to a distributive share in the estate; jurisdiction to determine such right being exclusively in the courts of the state of the administration, and primarily in the court of probate.

Scruggs v. Scruggs, 105 F. 28.

Mo. 1936. Generally, executor or administrator cannot be sued outside state of his appointment on claim against estate.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Generally, appearance of foreign administrator in suit brought against him in his representative capacity does not render judgment in such suit provable there or elsewhere as claim against estate.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

In absence of Louisiana statute authorizing foreign executor or administrator to be sued in Louisiana, service of process in admiralty suit in federal court in New Orleans on alleged agent of administratrices appointed by Missouri probate court *held* not valid against estate. Mo.St.Ann. § 185, p. 115, V.A.M.S. § 464.070.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Voluntary appearance of administratrices appointed by St. Louis probate court in admiralty suit in New Orleans did not confer on federal court in New Orleans jurisdiction to render judgment against administratrices.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Judgment rendered in admiralty suit in federal court in New Orleans against administratices appointed by probate court in St. Louis *held* not to establish valid demand for allowance against the estate in probate court in St. Louis. Mo.St.Ann. § 189, p. 121, V.A.M.S. § 464.080.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Alleged meddling by administratrices appointed by probate court in St. Louis with assets of estate in Louisiana *held* not to make

service of process in admiralty suit in federal court in New Orleans an exhibition of the demand of libelant against estate in Missouri. Mo.St.Ann. § 185, p. 115, V.A.M.S. § 464.070.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Alleged meddling by administratrices appointed by probate court in St. Louis with assets of estate in Louisiana *held* not to give validity to admiralty judgment of federal court in New Orleans so as to make judgment an established demand for allowance against estate in probate court of St. Louis. Mo.St. Ann. § 189, p. 121, V.A.M.S. § 464.080.

In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

Mo.App. 1879. Power of local administrator to recover property fraudulently brought into the state by a foreign administrator. See,

Lewis v. McCabe, 6 Mo.App. 600, memorandum.

Necessary parties to a proceeding by an administrator to recover property fraudulently brought into the state by a foreign administrator. See,

Lewis v. McCabe, 6 Mo.App. 600, memorandum.

Commencement of running of statute of limitations against action to recover property fraudulently concealed and brought into this state by a foreign administrator. See,

Lewis v. McCabe, 6 Mo.App. 600, memorandum.

Mo.App. 1913. Where an ancillary administrator's powers were limited by statute of the state of appointment to the defense of a suit against the intestate, the creditor on recovering judgment was not entitled to proceed on the judgment against the domiciliary administrator in another state.

First Nat. Bank v. Dowdy, 161 S.W. 859, 175 Mo.App. 478.

When an ancillary administrator, appointed in Arkansas, was only authorized by the laws of that state to defend a suit against intestate, the creditor, having recovered judgment, could not proceed thereon in Missouri under Rev.St.1909, § 1737, V.A.M.S. § 507.020, authorizing foreign administrators to sue in Missouri when such authority is possessed under the laws of their own state.

First Nat. Bank v. Dowdy, 161 S.W. 859, 175 Mo.App. 478.

⊂526. Accounting and settlement.

Mo. 1951. Where negotiations were conducted for contract between domiciliary executors and ancillary administrator involving items as to fees and commissions and divisions thereof, including item of adminstrator's commission which was to be limited to amount less than statutory rate and on which tentative agreement was reached, but parties had not intended piece-meal contract and had intended complete contract on all items to be reduced to writing, and no present binding agreement was ever intended, there was no meeting of minds and no binding contract, and administrator could take credit in final settlement for commissions at statutory rate. V.A.M.S. § 465.100.

In re Franz's Estate, 242 S.W.2d 490.

In proceeding to settle estate wherein ancillary administrator with will annexed took credit for administrator's commissions figured at statutory rate, and exceptions were taken on ground that the credits for commissions were excessive and improper, evidence was insufficient to establish alleged contract between domiciliary executors and ancillary administrator limiting administrator's commissions to amount less than statutory rate. V.A.M.S. § 465.100.

In re Franz's Estate, 242 S.W.2d 490.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

⊂527. Nature and extent in general.

⊂527 (1). In general.

Mo. 1822. An administrator may be sued on a bond given to a judge of probate and his successor in office, though the office is abolished and the law authorizing it repealed.

Oliver v. Crawford, 1 Mo. 263.

Mo. 1847. An administration bond containing more conditions than those required by statute is not invalid as a statutory bond.

Woods v. State, to Use of Rainey, 10 Mo. 698.

Mo. 1849. The statute which prevents attorneys from being sureties on administration bonds is merely directory, and a bond is not void because an attorney is one of the sureties.

Hicks v. Chouteau, 12 Mo. 341.

Mo. 1865. Where no action can be sustained against the administrator, none can be maintained against his sureties.

State, to Use of Hempstead, v. Coste, 36 Mo. 437, 88 Am.Dec. 148.

Mo. 1877. Where a will made the public administrator testator's executor, but he applied for no appointment as administrator with the will annexed, and gave no bond as such, and in his settlements he designated himself "public administrator," "executor,"

"administrator with the will annexed," and sometimes simply "administrator," but he never gave the notice required by section 8 of the statute (Wag.St. p. 123) to be given by a public administrator when he takes charge of an estate, he was chargeable as a public administrator.

State, to Use of Betts, v. Purdy, 67 Mo. 89.

Mo. 1878. The sureties on an administrator's bond at the time of his failure to comply with an order of the probate court adjudging a certain sum to be due from him and ordering him to pay over that sum to a designated person are liable for his default, even though they executed the bond long after the grant of letters and the waste or loss to the estate was prior to the execution of the bond.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1878. In an action against the sureties on an executor's bond to recover the amount of notes wrongfully pledged by the executor to secure his individual indebtedness, it appeared that the amount of the notes pledged was greater than the indebtedness, but the notes were collected by the creditor, and no part of the proceeds returned to the executor or to the estate; the reason for this not being shown by the evidence. *Held*, that defendants were liable for the full amount of the notes.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

Mo.App. 1925. Liability of surety on administrator's bond is determined by its contract, not by its knowledge or lack of knowledge of condition of estate at time of execution of bond.

State, to Use of Enyart, v. Doud, 269 S. W. 923, 216 Mo.App. 480.

Mo.App. 1926. Executor liable on bond for failure to faithfully administer estate.

Welch v. Diehl's Estate, 278 S.W. 1057.

⇐527 (2). Joint, successive, or additional bonds.

Rev.St.1855, p. 120, § 41, empowering the county court to order an administrator to give additional security, construed not to relieve the first bondsmen from liability, though both sets of bondsmen may be equally liable as between themselves.

Mo. 1873. State, to Use of Glenn, v. Fields, 53 Mo. 474.

Mo. 1874. Haskell v. Farrar, 56 Mo. 497.

Mo. 1874. Palmer v. Farrar, 56 Mo. 499.

Mo. 1875. It is only for some one of the causes specified in Wag.St. p. 76, art. 1, § 37, authorizing the giving of new bonds by administrators, that the county court may require a new bond, the approval of which will operate to discharge the sureties on the old one for the future default of an administrator; and the giving of a second bond not in pursuance of the statute, but as simply a voluntary and additional bond, has the effect of adding a new security for the faithful performance of the administrator's duties, and does not affect the first bond, though the parties intended to relieve one of the sureties in the old bond.

Wood v. Williams, 61 Mo. 63.

Mo. 1878. The fact that an administrator had already executed one bond would not invalidate a second bond subsequently executed by him with different sureties, although no order of court required its execution.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1878. Where an executor pledged securities belonging to the estate to a bank as collateral to secure a loan before the giving of an additional bond, and after giving such bond the bank sold the collateral and applied the proceeds to the payment of the executor's indebtedness, the fact that the bank knew that the collateral belonged to the estate, so that no title passed to the bank, is no defense to an action on the first bond.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

The sureties of an administrator, who has committed a breach of his bond by converting to his own use the property of the estate, will be liable upon their undertaking, though the administrator may have subsequently given an additional bond and have made settlements carrying down the balance due the estate, so as to make the sureties upon the additional bond also liable.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

Where an executor was guilty of misconduct for which the sureties on his bond were liable, and thereafter gave another bond, the sureties on which also became liable for the consequences of the misconduct, a judgment on the second bond in favor of the obligee was not a bar to an action on the first bond.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

Mo. 1900. Sureties on tthe official bond of the public administrator are liable only for money or property which actually was or came into his hands during the term covered by the bond on which they are sureties.

State ex rel. Jacobs v. Elliott, 57 S.W. 1087, 157 Mo. 609, 80 Am.St.Rep. 643.

Mo.App. 1877. The giving by an executor of an additional bond is by virtue of Wag. St. p. 76, § 39, a complete discharge of the former sureties from any liability after the date of the giving of the additional bond, but is no discharge for any liability for misconduct on the part of the executor prior to that time.

Wolff v. Schaeffer, 4 Mo.App. 367.

Mo.App. 1878. An additional bond given by an administrator is cumulative, and does not discharge the sureties on the first bond.

Lewis v. Gambs, 6 Mo.App. 138.

Mo.App. 1881. The law in regard to the bond of the public administrator is found in Administration Law, art. 9, § 2, providing that the court may, from time to time, as occasion shall require, demand additional security of such administrator; and it is manifest that it was not the intention of the Legislature that the giving of such a bond should release the sureties upon the bond already existing.

State, to Use of Lewis, v. Wolff, 10 Mo. App. 95.

Wag.St. p. 122, § 9, providing that, in addition to the provisions of this chapter, the public administrator and his sureties shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions, and proceedings as are enjoined upon, or authorized against, executors or administrators by this law, so far as the same may be applicable, was obviously inserted to avoid a more specific enumeration of the duties of a public administrator, and was not intended to bring a new bond given by the public administrator by direction of the court within the provision of the general law in regard to a new bond given by a private administrator.

State, to Use of Lewis, v. Wolff, 10 Mo. App. 95.

Wag.St. p. 75, §§ 36–39, providing that any person interested in an estate may make an affidavit that he has good reason to believe and does believe that the penalty of the administrator's bond is insufficient, and shall give notice, and that if the court shall find the complaint to be just it shall order another bond, which, given and approved, shall discharge the former sureties from any liability of the principal after filing same, do not apply to the case of public administrators.

State, to Use of Lewis, v. Wolff, 10 Mo. App. 95.

Mo.App. 1902. Where a public administrator succeeds himself and gives a new bond, the second bond covers liabilities for misappropriation of funds during its life, though the funds came into his hands during the life of his former bond.

State ex rel. Rutledge v. Holman, 67 S.W. 747, 93 Mo.App. 611.

Where there was no evidence to prove that a public administrator's defalcation occurred during his first term, but there was evidence that it occurred later, the annual settlements he made showing the balance sued for to be still in his hands during his second term, the sureties on his second bond were the parties liable.

Mo.App. 1903. State ex rel. Scott v. Greer, 74 S.W. 881, 101 Mo.App. 609.

Mo.App. 1903. State ex rel. Gregory v. Horton, 74 S.W. 1117, 101 Mo.App. 701.

⇐528. Property covered.

⇐528(1). In general.

Mo. 1827. Money arising from an administrator's or executor's sale of real estate is assets in his hands, and hence his bondsmen are liable therefor under a bond conditioned that he shall well and truly administer the goods, chattels, rights, and credits, and all other goods, etc., which have or shall come to his hands which were the deceased's at the time of his death.

Governor of Missouri, to Use of Hill, v. Chouteau, 1 Mo. 731.

Mo. 1872. Under the administration act, Wag.St. p. 78, §§ 53, 54, providing that the administrator of a deceased partner shall include in his inventory the gross amount of the partnership estate, such administrator was not authorized to take charge of or exercise control over the partnership estate; and, such act not being within the sphere of his duties, his bond did not cover them, and the sureties thereon were not liable for his mismanagement of partnership assets.

Vahey's Adm'r v. Vahey, 49 Mo. 428.

Mo. 1874. In the absence of any statutes dispensing with probate anew, and giving a will extraterritorial force, one cannot be held liable on his bond as executor for his acts done in another state.

Cabanne v. Skinker, 56 Mo. 357.

Mo. 1879. Where an administrator of the estate of a resident of Kentucky came into Missouri, bringing money resulting from a sale of the decedent's lands in Kentucky with him, and was appointed ancillary administrator in Missouri, the sureties on his bond as ancillary administrator could not be subjected to liability for his default in respect to such money.

State ex rel. Liggett v. Osborn, 71 Mo. 86.

Mo. 1942. Whether surety on administrator's bond should be held liable for prop-

erty allegedly belonging to estate but withheld therefrom by administrator depends upon whether estate was actually decreased by withholding from it assets to which it was entitled.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S. W.2d 86, 349 Mo. 528.

Mo.App. 1879. Wag.St. p. 73, § 18, provides that an administrator shall give a bond that he "will faithfully administer the estate, account for, pay, and deliver all the moneys and property of said estate, and perform all other things touching said administration, required by law or the order or decree of any court having jurisdiction." The administrator brought an action of claim and delivery, but judgment was rendered against him for the value of the property taken. *Held*, that the sureties of the administrator were liable for the performance of the judgment, since the judgment was not a determination that the goods delivered to the administrator by the sheriff were not the property of the estate.

State, to Use of Walsh, v. Dailey, 7 Mo. App. 548.

Mo.App. 1886. Where an administrator takes trust moneys, which were in the hands of the intestate as trustee on his inventory, and reports them to the probate court as trust moneys, and applies for an order to turn them over, the court is bound to make such an order.

State ex rel. Boughton v. Tubb, 22 Mo. App. 91.

Mo.App. 1915. Under Rev.St.1909, §§ 299, 302, 303, V.A.M.S. §§ 461.780, 461.820, 461.840, surety on bond of public administrator, ex officio guardian of minors, *held* liable thereon on guardian's conversion of a minor ward's estate.

State ex rel. and to Use of King v. United States Fidelity & Guaranty Co., 176 S.W. 543, 188 Mo.App. 705.

Mo.App. 1934. Surety on administrator's bond *held* liable thereon to widow of decedent's father, named beneficiary in decedent's war risk insurance policy, for amount of her half interest in unpaid proceeds thereof, where administrator failed to pay amount received to administrator of beneficiary's estate or his proven distributees. Mo.St.Ann. § 325, p. 212, V.A.M.S. § 469.090.

State ex rel. Lankford v. Fidelity & Deposit Co. of Maryland, 74 S.W.2d 904, 228 Mo.App. 953.

Mo.App. 1941. The surety on administrator's bond could not question either capacity in which administrator acted in administering proceeds of life policy turned over to administrator pending appeal of divorced wife in interpleader proceeding between administrator and divorced wife involving proceeds, or whether such proceeds actually belonged to estate.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

The sureties on administrator's bond are responsible for all moneys and property coming into hands of administrator by virtue of his office.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

⇐528 (2). Property received or converted before execution of bond.

Mo. 1900. Rev.St.1889, § 5318, V.A.M.S. § 457.310, directs the public administrator to loan trust funds coming into his hands only on prime real estate security. Defendants became sureties on the bond of a public administrator December 10, 1888. Prior to this time funds belonging to the estate had been collected by such administrator, deposited in the bank, and checked out. After his death, there was no trace of the funds so collected, except a note secured by mortgage for a very small portion of the fund. The probate court records failed to show any loans on real estate reported by him or approved by the court. *Held*, that these facts overcome the presumption that the money was loaned in accordance with the statute, and justify conclusion that a misappropriation occurred prior to the date when defendants became sureties.

State ex rel Jacobs v. Elliott, 57 S.W. 1087, 157 Mo. 609, 80 Am.St.Rep. 643.

⇐528 (3). Property not assets of estate.

Mo. 1942. Whether the surety on administrator's bond should be held liable for property belonging to a third person taken by administrator under the claim that it is an estate asset depends upon whether estate was actually increased by such property to which estate was not entitled.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Where administrator holds specific property actually belonging to a third person under the claim that it is an estate asset, the owner thereof may maintain a suit in replevin for such property against the administrator in his official capacity.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Where property actually belonging to a third person but taken by administrator under the claim that it is an estate asset has been sold and the proceeds received by admin-

istrator as part of the estate, equity will afford relief to owner by decreeing payment to be made for such property out of funds of the estate.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Where administrator obtained proceeds of life policy from circuit court clerk, pending appeal of divorced wife of deceased from judgment in interpleader proceeding between administrator and wife awarding the proceeds to administrator, expenditure of a portion of such proceeds for attorney's fees and other costs and expenses of administration constituted a "breach" of the obligation of faithful administration imposed by statutory bond for which surety on bond was liable upon administrator's refusal to make restitution when appellate court awarded proceeds of life policy to deceased wife's estate. Mo.R.S.A. § 19, V.A.M.S. § 461.270.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Where administrator obtained possession of property actually belonging to a third person under the claim that it was an estate asset prior to final determination of litigated question of ownership, obligation of faithful administration imposed by statutory bond placed administrator under duty of protecting both the estate and owner against loss resulting from disposition of such property before ownership thereof had been finally determined and failure to do so would constitute a "breach" of the obligation of administrator's bond for which surety thereon would be liable. Mo.R.S.A. § 19, V.A.M.S. § 461.270.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Where administrator obtains possession of property belonging to a third person under the claim that it is an estate asset, liability therefor on administrator's bond arises when the question of ownership is finally determined against the estate and the administrator refuses to make restitution.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S.W.2d 86, 349 Mo. 528.

Mo.App. 1918. Where intestate had interest in land in state other than that in which administratrix was appointed, administratrix having no power as administratrix over such land cannot be sued by creditors of the estate for value of such interest diverted from the estate.

Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo.App. 169.

Mo.App. 1939. After probate court's adjudication that diamond rings belonged to husband and did not constitute any part of deceased wife's estate had become final, bondsmen of wife's administratrix ceased to have any liability on account of administratrix' mishandling the diamonds.

Manley v. Ryan, 126 S.W.2d 909, 235 Mo. App. 45.

Mo.App. 1943. If heirs contend that administrator failed to account for a debt due from him to the estate, and such alleged debt has not been charged to administrator in the inventory, heirs would have recourse against administrator and his sureties on his official bond, but the probate court would be without jurisdiction in the premises.

In re Nelson's Estate, 166 S.W.2d 333, 237 Mo.App. 28.

⇐528(4). Real estate and proceeds thereof.

Mo. 1851. The sureties of an administrator are liable for the misapplication of rents and profits of land received by him.

Stong v. Wilkson, 14 Mo. 116.

Mo. 1877. The sureties on an executor's bond are liable for rents collected from land of the estate, and for proceeds of the sale of land, though the real estate passed to the heirs or devisees on the death of testator.

Dix v. Morris, 66 Mo. 514, affirming 1 Mo. App. 93.

Mo. 1887. Though an administrator or executor takes possession of real estate and collects the rents arising therefrom without an order of the probate court, he and his sureties must account therefor.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1897. An executor and his sureties are not liable on his bond for the proceeds of lands in a foreign state, sold by him under power conferred by the will, said will never having been probated in the state where the lands lie, so as to authorize such sale.

Emmons v. Gordon, 41 S.W. 998, 140 Mo. 490, 62 Am.St.Rep. 734.

⇐528 (5). Debts of executor or administrator to estate.

Mo. 1876. The sureties of an executor are not liable for an indebtedness due from their principal to decedent, irrespective of the solvency or insolvency of such executor.

McCarty v. Frazer, 62 Mo. 263.

Mo. 1912. Where executors were solvent when they took charge, thereafter their debts to the estate were assets in their hands, under Rev.St.1909, § 108, V.A.M.S. § 462.180,

for which their bondsmen were jointly liable.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

⇐528 (6). Property held in other capacities.

Mo.App. 1936. Executor may occupy dual relationship with respect to estate in his hands, as both that of executor and trustee, in which case sureties on executor's bond are liable for loss occasioned by executor's improvident acts as trustee with respect to trust fund.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Executor is required to account for all money received by him as executor, even though of trust character, and is liable on bond for failure to so account.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Under will creating trust and requiring testator to pay income from trust fund to widow for life and distribute principal to testator's children upon death of widow, executor *held* to continue as such so as to be liable with sureties on his bond for misappropriation of trust fund after approval of purported final settlement in which executor was ordered to hold fund and make payments therefrom under terms of trust.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Where executor is directed to retain fund to be paid over at future date and fund is retained thereunder, executor and sureties on his bond remain charged with liability therefor until fund is finally paid over as directed.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Until executor accounts for trust fund taken in charge along with other assets of estate, sureties on executor's bond are liable for his default in payments from trust fund.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Executor *held* without power to discharge himself or sureties on his bond from further liability on account of trust fund retained by him by payment of fund to trustee appointed by circuit court of county in which estate was being administered without probate court first having directed such payment.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Trust fund retained by executor for disbursement under terms of will *held* to remain in custody of executor until finally disbursed under jurisdiction of probate court, so that executor was liable to account therefor in probate court and letters testamentary as executor were subject to revocation for misappropriation of fund, after which executor would be required to account for fund and would be liable on bond together with sureties for failure to do so. Mo.St.Ann. §§ 43, 48, 49, pp. 27, 31, V.A.M.S. §§ 461.500, 461.550, 461.560.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

⇐529. Functions and acts covered.

Mo. 1826. A surety on an administrator's bond is not bound for debts due by the administrator before administration.

Scott v. Governor of Missouri, 1 Mo. 686.

Mo. 1882. Where the sureties on a replevin bond given by an administrator are compelled to pay a judgment on such bond, they are entitled to recover from the sureties of the administrator.

State, to Use of Walsh, v. Farrar, 77 Mo. 175.

Administrator's nonpayment of taxes assessed against estate makes administrator and surety personally liable on bond requiring performance of all things touching administration required by law. Rev.St.1919, §§ 181, 12756, 12766, 12773, 12932, V.A.M.S. §§ 137.110, 137.145, 140.730, 464.010.

Mo. 1930. State ex rel. and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460.

Mo. 1930. State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791.

Administrator's nonpayment of taxes assessed against him, not against estate, *held* not breach of bond requiring performance of all things touching administration required by law. Rev.St.1919, §§ 181, 12756, 12766, 12773, 12932, V.A.M.S. §§ 137.110, 137.145, 140.730, 464.010.

Mo. 1930. State ex rel. and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460.

Mo. 1930. State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791.

Mo.App. 1877. A surety in an executor's bond conditioned, as provided by Wag.St. p. 65, § 12, and page 73, § 18, on the executor faithfully administering the estate and accounting for all money and property of the estate, is liable for the misconduct of the executor occurring prior to the execution of the bond.

Wolff v. Schaeffer, 4 Mo.App. 367.

Mo.App. 1892. Rev.St.1889, § 98, V.A.M.S. § 462.170, provides that all debts due by an administrator to his testator or intestate

For later cases see same Topic and Key Number in Pocket Parts

shall be considered as assets in his hands, and section 99 provides that, if any person appoint his debtor executor of his will, such appointment shall not discharge the debt, but it shall be assets in his hands. *Held*, that an executor who owes money to the estate on overdue notes may inventory them as money, and by so doing charge his sureties with so much money on hand, and his subsequent insolvency does not relieve him, nor does his insolvency at the time when he made the inventory, unless it amounts to a total inability to pay; but, if he inventories the notes as notes, he is responsible and remains responsible on them as notes, and the character of the assets is not changed by the appointment of the debtor as executor.

Young v. Thrasher, 48 Mo.App. 327.

Mo.App. 1922. Where the administrator of an estate which owned capital stock in a corporation, by voting the stock as it was his duty to do, had himself made president and manager of the corporation, the surety on his bond as administrator did not thereby become liable to the creditors of the estate for the adoption by the corporation of a resolution to devote the proceeds of the sale of its property to the payment of the corporation's debts, which could have been enforced by any creditor of the corporation.

Mississippi Valley Trust Co. v. Taylor, 238 S.W. 558.

Mo.App. 1925. Where devisee of interest in realty, after order for sale of such property to pay decedent's debts, gave trust deed on such interest to secure note, executor's refusal to pay note, out of proceeds of property remaining in his hands after settlement of decedent's debts on written orders by devisee for such payment, was breach of trust, for which he and his surety were liable.

State, to Use of Enyart, v. Doud, 269 S. W. 923, 216 Mo.App. 480.

Under Rev.St.1919, §§ 18, 26-28, V.A.M. S. §§ 461.270, 461.380 to 461.410, new or additional bond given by administrator or executor relates back and sureties thereon become liable for administrator's wrongful distribution of proceeds of realty to devisee, rather than to one entitled thereto, under devisee's deed of trust, though such distribution was made before execution of bond.

State, to Use of Enyart, v. Doud, 269 S. W. 923, 216 Mo.App. 480.

Mo.App. 1931. Where executor took possession of relator's bonds found in deceased's safe deposit box as being property of estate, relator could sue executor as such and his bondsman.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

⇐530. Settlement and discharge of principal.

Mo. 1884. Under Rev.St.1879, §§ 48, 49, V.A.M.S. §§ 461.550, 461.560, providing that, if any executor or administrator have his letters revoked, he shall pay to his successor all money in his hands belonging to the estate, etc., an executor whose letters have been revoked, and who has turned over to his successor all the property of the estate, is not thereafter liable on his bond for failure to pay a claim which was allowed while he was executor.

State ex rel. Crane v. Heinrichs, 82 Mo. 542.

Mo. 1891. After final settlement of an administrator's account, a creditor of the estate cannot maintain an action against the sureties on his bond on the ground that the administrator allowed himself credits to which he was not entitled; but the only remedy, after final settlement, is an action under Rev.St.1879, § 287, V.A.M.S. § 465.250, for assets of the estate wasted and not carried into the settled accounts, or a direct proceeding in equity to set the settlement aside, if the credits were procured to be allowed by the court through the administrator's fraud.

State ex rel. Pountain v. Gray, 17 S.W. 500, 106 Mo. 526.

Mo.App. 1888. On the final settlement of an administrator, the probate court made an order finding a balance against the administrator, and the court ordered it to be retained by him and appropriated to the support and maintenance of two children of deceased, and thereupon discharged him as administrator. *Held*, in an action on the administrator's bond, that the sureties were not concerned with the conduct of the administrator as concerned such fund after the discharge.

State, to Use of Kitchell, v. Anthony, 30 Mo.App. 638.

Mo.App. 1916. Bondsmen on an administrator's bond are not responsible for the acts of their principal in the bond after he has been discharged by order of court.

State ex rel. Noll v. Noll, 189 S.W. 582.

Mo.App. 1928. Heir may sue on administrator's bond without order of distribution, where estate is fully administered except for distribution.

State ex rel. Toller v. Ennis, 7 S.W.2d 737, 222 Mo.App. 713.

⇐531. Discharge of sureties.

Mo. 1875. Where the letters of a co-administratrix were impliedly revoked by an order of distribution approving a final settlement by the co-administrator alone, sureties on the joint bond are liable for the default of

her co-administrator during his separate administration.

State ex rel. Rucker v. Rucker, 59 Mo. 17.

Mo. 1879. After the delivery of an administrator's bond, it is out of the power of the administrator or any one else to release the bondsmen by erasing their names from the bond.

Brown v. Weatherby, 71 Mo. 152.

Mo. 1889. Rev.St.1879, § 307, V.A.M.S. § 461.840, making public administrators "subject to the same duties, penalties, provisions, and proceedings as are enjoined upon or authorized against executors and administrators by this chapter, as far as the same may be applicable," does not exclude public administrators and their sureties from the benefits of chapter 66, section 3906 et seq., V.A.M.S. § 433.130 et seq., providing for the discharge of sureties on official bonds, and limit them to the provisions for sureties on executors' and administrators' bonds.

State ex rel. Bell v. Nolan, 12 S.W. 1047, 99 Mo. 569.

Mo.App. 1880. Plaintiff and defendant became sureties on the bond of K. as executor of B. K. died, and plaintiff and D. became executors of K. At the time of K.'s death he had in his hands funds belonging to the estate of B., and B.'s administrator de bonis non established a demand against K.'s estate, and plaintiff and D. drew their check therefor against the funds of the K. estate, and in their first settlement as executors of K. took credit for the amount of the payment. Later, when plaintiff, as surviving executor of K., made final settlement, the estate proved to be insolvent, and plaintiff was obliged to make good to those interested in the estate, the excessive and unauthorized payment of the claim in favor of B.'s estate. Defendant was told nothing about the matter until three years after the payment was made by plaintiff. *Held*, that plaintiff was not entitled to contribution from defendant, since the transaction must be regarded as a payment out of the funds of the principal debtor, K., of the indebtedness for which plaintiff and defendant were liable as sureties, and it is settled that such payment discharges the sureties, no matter where the money came from.

Seitz v. Hill, 9 Mo.App. 122.

Mo.App. 1893. At the time of the execution of the bond of a public administrator, his duties were confined to the care of the estates of deceased persons. Afterwards the office of public guardian and curator was created, and the duties thereof imposed on the public administrator, Acts 1885, p. 27. *Held* not to discharge the sureties; they being only responsible for their principal's default in a duty of the office as it existed at the execution of the bond.

State ex rel. Drach v. Cheaney, 52 Mo. App. 258.

Mo.App. 1917. Though a petition by administrator's surety for an order releasing it from liability did not bear any file mark and probate judge did not remember receiving it, that it was afterwards found among the papers of estate was sufficient to show that petition was filed with probate court.

In re Fulsome's Estate, 193 S.W. 618.

An entry in minute book of probate court, reading "Order releasing (a surety company) made and judgment of court entered on June 2d, as heretofore set out" *held* incomplete, in that it does not show on what it was based.

In re Fulsome's Estate, 193 S.W. 618.

Mo.App. 1932. After revocation of order appointing administratrix, her surety was not liable to creditor, though administratrix subsequently had claim approved.

Holland v. Reburn, 52 S.W.2d 219.

⇐532. Breach or fulfillment of condition.

U.S.Mo. 1856. Where administrator sold property mortgaged for debt due decedent, his failure to account for purchase money was a devastavit for which he and his sureties were liable on his bond.

Long v. O'Fallon, 60 U.S. 116, 19 How. 116, 15 L.Ed. 550.

Mo. 1829. The improvement of the real estate of an intestate by the administratrix is a misapplication of the funds of the estate, and the security will be liable for the waste committed.

Byrd v. Governor of Missouri, 2 Mo. 102.

Mo. 1829. Where an administrator gave a receipt for a surplus remaining in the sheriff's hands after satisfying the debts of the intestate, for which his property was sold on execution, but never received the money, it was *held* that the surety on the administration bond was liable for this surplus to an administrator having assets of the intestate in another state.

Chouteau v. Hill, 2 Mo. 177.

Mo. 1856. An administrator de bonis non is not to be charged, in an action on his bond, with judgments that have come to his hands, unless want of diligence be proved.

State, to Use of Reyburn, v. Ruggles, 23 Mo. 339.

Mo. 1857. The bond of an executor is broken if he fails to make a complete and perfect inventory of the estate of his testator.

Sherwood's Adm'r v. Hill, 25 Mo. 391.

The failure of an executor to inventory goods of his testator received before the grant of letters testamentary is a breach of trust for which his bondsmen are liable.

Sherwood's Adm'r v. Hill, 25 Mo. 391.

Mo. 1877. Under a condition in an executor's bond that such executor will "well and faithfully execute the last will," etc., the sureties are liable for rents and proceeds of land collected and misappropriated by their principal, where the will directs the executor to sell real estate.

Dix v. Morris, 66 Mo. 514.

Mo. 1878. By reason of the mere failure of an administrator to sell land for the payment of debts, as required by order of the probate court, a creditor, whose claim has been allowed and classified, does not become entitled to recover of the administrator and his sureties the amount of his demand.

State ex rel. Robinson v. Smith, 68 Mo. 641.

Mo. 1880. A demand owing to the estate of a deceased partner by the partnership should be adjudicated in the probate court during the administration of the partnership estate, and, where that is not done, the remedy of the heirs of the deceased partner is on the bond of the administrators for their neglect in not procuring the allowance of such demand.

Hellmann v. Wellenkamp, 71 Mo. 407.

Mo. 1881. Wag.St. p. 76, § 39, provides that an additional bond, given by an executor, shall discharge the sureties on the first bond from liability for any misconduct after the filing of the second bond. An executor pledged assets of the estate to secure his individual debt, and, after the filing of an additional bond, the assets were collected, and used to extinguish the executor's individual debt. *Held*, that the fact that the executor could have sued after the execution of the second bond and recovered the pledged assets did not render his failure to do so his only misconduct, so as to relieve the sureties for the first bond from liability for the conversion of the assets.

State, to Use of Wolf, v. Berning, 74 Mo. 87, affirming 6 Mo.App. 105.

Mo. 1881. Where an executor pledged notes belonging to the estate to secure his own notes, and, though the pledge was given during the life of the original bond, he could have sued for and recovered the notes at any time during the life of an additional bond, the breach was a continuing one, for which the sureties on both bonds were liable.

Wolff v. Schaeffer, 74 Mo. 154.

Mo. 1884. Where the court entered an order requiring an executor to pay the balance unpaid on a demand, but did not fix the amount to be paid, and on motion of the executor the order was set aside, and another order immediately entered setting forth the amount to be paid, the action of the court in setting aside the first order and entering the second was to be considered one entire transaction, of which the executor had notice, so as to make a failure to obey a breach of the bond for which his sureties would be liable.

State ex rel. Richardson v. James, 82 Mo. 509.

Mo. 1887. An administrator with the will annexed, who in his individual capacity buys up an outstanding interest in land partially owned by the estate, pays off a mortgage, sells and conveys the land by a deed executed in the individual names of himself and his sister, his sole residuary co-legatee, and pays the proceeds to general legatees, is responsible, along with the sureties on his bond, although the sale was made on his own motion, and not by order of court, under the power of sale given in the will to creditors of the estate, whose claims against the estate were postponed by these wrongful payments to legatees.

Lewis v. Carson, 3 S.W. 483, 6 S.W. 365, 93 Mo. 587.

Mo. 1944. Failure to pay judgment against decedent's estate was not a breach of executor's bond, where assets were insufficient to pay all claims against estate and guardian of insane judgment creditor under authority properly granted by probate court having jurisdiction of ward's estate had released judgment pursuant to agreement between debtor's heirs and creditors. Mo.R.S.A. §§ 17, 19; V.A.M.S. §§ 461.250, 461.260; V.A.M.S.Const. art. 6, § 34.

State ex rel. Bovard v. Weill, 182 S.W. 2d 521, 353 Mo. 337, 155 A.L.R. 191.

Mo.App. 1882. Liability of executor for allowing unfounded claim. See,

Gray v. Clement, 12 Mo.App. 579, memorandum.

Mo.App. 1896. The failure of an administrator to discharge a claim allowed by the probate court for legal services rendered in the making and sustaining of such administrator's final settlement is a breach of his bond, for which an action will lie.

State ex rel. O'Brien v. Walsh, 67 Mo. App. 348.

Mo.App. 1903. The payment of taxes and insurance and expending of money in repairing real estate by an administrator is not a breach of his bond, it being his duty in the preservation of the estate.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.

For references to other topics, see Descriptive-Word Index

An administrator was ordered by the court to sell a stock of jewelry belonging to the estate at not less than its appraised value, and, if sold on credit, to take good, solvent notes. The administrator sold the goods at the appraised value, taking the individual notes of the purchaser for the entire price, but only received a small portion of such value, and subsequently surrendered the notes, retook the goods, and sold them again; the aggregate sum realized being much less than the appraised value. *Held*, that the failure of the administrator to take solvent notes for the goods was a breach of his bond, and it was no defense that he could not have sold the stock to any one else, and that he realized all that it was worth.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.

The payment by an administrator of claims against the estate, not probated, and without any order of court, is gross negligence, and constitutes a breach of his bond.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.

Mo.App. 1922. Where an administrator had been removed and a successor appointed, his failure to tender to the successor certificates of stock belonging to the estate until just before the trial in the circuit court on appeal from the probate court was technical devastavit, which renders him and his surety liable for the costs of the proceedings against them.

Mississippi Valley Trust Co. v. Taylor, 238 S.W. 558.

⇐533. Necessity of accounting and default by principal.

An administrator having refused to pay a demand, although having assets sufficient therefor, an order of the probate court upon him to do so is not necessary before bringing suit upon his bond.

Mo. 1827. Governor of Missouri, to Use of Hill, v. Chouteau, 1 Mo. 731.

Mo. 1882. State ex rel. Longdon v. Shelby, 75 Mo. 482.

Mo. 1827. Where an administrator or executor has assets belonging to the estate, his sureties are liable on his bond for a judgment obtained against him, though an execution was not issued thereunder.

Governor of Missouri, to Use of Hill, v. Chouteau, 1 Mo. 731.

Mo. 1845. In an action on the bond of an administrator who has been removed by the administrator de bonis non, to recover moneys in his hands as such administrator, it is not necessary, under the statute of 1835, to show a settlement of his account with the court and an order of payment.

State, to Use of Darland, v. Porter, 9 Mo. 356.

Mo. 1869. When the debts of an intestate are all proved up and paid, the heirs have a direct vested legal interest in the estate, and may maintain an action against the administrator for breach of his bond, even though an order of distribution has not been issued.

State ex rel. Midgett v. Matson, 44 Mo. 305.

Mo. 1881. Until an order is made by a probate court for an administrator to pay a demand, or a certain portion thereof, no action lies against the administrator.

State ex rel. Shinn v. Stafford, 73 Mo. 658.

Mo. 1882. In an action on an administrator's bond for nonpayment of an allowed claim, it was sufficient to show assets ample to pay the claim and a refusal to do so, and it was not necessary to show an order of the probate court for the payment of the demand which had been allowed against the estate.

State ex rel. Longdon v. Shelby, 75 Mo. 482.

Mo.App. 1878. Necessity of final settlement before instituting suit on bond of absconding administrator. See,

State, to Use of Doyle, v. Coffey, 5 Mo. App. 578, memorandum.

⇐534. Necessity and sufficiency of proceedings for recovery against principal.

Mo. 1887. In a statutory action, under Rev.St.1879, § 290, for breach of an executor's bond in not making a settlement of accounts, and not accounting for legacies under the provision of the will, it is not necessary that the executor should have assented to the legacy, nor are the legatees restricted to an action in the probate court, or compelled to resort to a court of equity to charge such executor as trustee in order to recover the legacy, as they may proceed in the first instance by an action on the bond against the executor and his sureties for the breach of his condition, and recover their legacies in the shape of damages for such breach.

State ex rel. Fagan v. Grigsby, 5 S.W. 30, 92 Mo. 419.

⇐535. Conclusiveness of adjudication against principal.

Mo. 1858. A judgment against an administrator, requiring him to pay over to the distributees a certain sum as assets of the estate, is, in the absence of fraud, conclusive

upon the sureties on the administrator's bond as to the existence of assets in the administrator's hands.

State, to Use of Griffith, v. Holt, 27 Mo. 340, 72 Am.Dec. 273.

Mo. 1863. In an action against an executor and his sureties, under the statutes, Rev.Code 1855, p. 162; Administration Act, art. 5, §§ 14, 15, to recover a claim allowed by the county court against the estate of the testator, the executor having refused to pay the same, he cannot show that he had no money of the estate applicable to the demand; it being res adjudicata. The sureties are in the same position by the conditions of their bond.

Taylor v. Hunt, 34 Mo. 205.

Mo. 1877. The judgments of the probate court settling the annual and final accounts of an executor are conclusive on the sureties on his bond.

Dix v. Morris, 66 Mo. 514.

Mo. 1878. Suit may be maintained against the sureties of an administrator, who has been ordered to pay over money by the probate court, and the judgment of that court against the administrator is conclusive against the sureties.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1881. A judgment ordering an executor to pay a residuary legatee a certain sum is conclusive as against the executor's sureties of the right of that legatee to maintain action.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo. 1882. Under Rev.St.1879, § 235, V.A.M.S. § 465.130, providing that, if any executor fail to pay any claim when demanded, the clerk, on application of the creditor, shall issue execution, a claim that no demand had been made on an executor prior to the issuance of an execution against him cannot be raised in a proceeding on a sci. fa. against the sureties on the bond of the executor; the proper time to raise the question of demand being on motion by the executor to quash the execution.

Newton v. Cox, 76 Mo. 352.

Mo. 1882. A judgment against an administrator, rendered upon final settlement, and order then made upon him, is conclusive, and not merely prima facie, evidence against the sureties upon his bond as to the amount due by the administrator, although one of the sureties sought to be held had no notice of the suit, and was out of the country during the litigation.

State ex rel. Christy v. Donegan, 12 Mo. App. 190, affirmed 83 Mo. 374.

Mo. 1884. An order requiring an executor to pay a claim out of the funds shown to be in his hands has the force and effect of a general judgment, and is binding on the sureties on his bond, conditioned to perform all things touching the executorship required by law or the order or decree of any court having jurisdiction.

State ex rel. Richardson v. James, 82 Mo. 509.

Mo. 1900. Mere statements by a public administrator in his annual settlements that money belonging to an estate is in his possession, and charging himself therewith, are not conclusive of the fact against the sureties on his bond.

State ex rel. Jacobs v. Elliott, 57 S.W. 1087, 157 Mo. 609, 80 Am.St.Rep. 643.

Mo. 1905. Where the sureties on an administrator's bond, after due notice of final settlement, let the judgment go against the principal, and take no part in the proceedings until the period for an appeal has elapsed, the judgment is conclusive as to them.

State ex rel. Taaffe v. Goggin, 90 S.W. 379, 191 Mo. 482, 109 Am.St.Rep. 826.

Where a surety on an administrator's bond had died three years before any notice was given or judgment rendered against the principal on final settlement, and there was no administration of the estate of the deceased surety, a judgment rendered against the principal on the final settlement was not conclusive against the surety's estate.

State ex rel. Taaffe v. Goggin, 90 S.W. 379, 191 Mo. 482, 109 Am.St.Rep. 826.

Mo. 1927. Where administrator was bound by finding of probate court that decedent was nonresident, made in passing on application for distribution, his surety was likewise bound. V.A.M.S. § 461.270.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

Mo.App. 1877. Conclusiveness of judgment against principal in an administrator's bond as against the surety. See,

State, to Use of Speer, v. Richmond, 3 Mo.App. 573, memorandum.

Mo.App. 1890. The sureties of an administrator are conclusively bound, in the absence of fraud or collusion, by judgments against their principal.

LaFayette Mut. Bldg. Ass'n v. Kleinhoffer, 40 Mo.App. 388.

Mo.App. 1902. Where a public administrator succeeds himself, and gives a new bond, on an issue whether moneys received

during the life of the first bond were misappropriated under the second, it being shown by settlements during the life of the second bond that the estate was in his hands, such settlements, in the absence of controverting evidence, raise a presumption that the estate was not then misappropriated.

State ex rel. Rutledge v. Holman, 67 S. W. 747, 93 Mo.App. 611.

Mo.App. 1933. Probate court judgment approving voluntary settlement between administrator of deceased administrator and administrator de bonis non of estate, and ascertaining amount due estate according to settlement *held* binding on sureties on deceased administrator's bond, absent appeal therefrom, though sureties had no notice. Rev.St.1929, §§ 48–52, 55, V.A.M.S. §§ 461.-550–461.590, 461.620.

State ex rel. Mann v. Reynolds, 62 S.W. 2d 483.

⇐536. Summary remedies.

Mo. 1848. Under the act of 1835 (administration law) an appeal would not lie from the decision of the county court on a sci. fa. issued against the sureties of an administrator for his failure to pay a judgment against him as such administrator.

Martin v. Milam, 11 Mo. 602.

Mo. 1872. Wag.St. p. 81, § 67, conferring power on the probate courts, after letters of administration are revoked, to enter an order or judgment in a summary proceeding against the administrator and his sureties, and enforce the same by execution for the amount of money specified in the judgment, is not limited to any particular probate courts, and hence applies to the probate court of St. Louis county; there being no special provision to the contrary contained in the act establishing that court.

Wickham v. Page, 49 Mo. 526.

Under Wag.St. p. 81, § 67, conferring power on probate courts, after letters of administration are revoked, to enter an order or judgment in a summary proceeding against the administrator and his sureties, and enforce the same by execution for the amount of money specified in the judgment, a contention by the surety on the bond of an administrator whose letters were revoked, who, having been duly notified, appeared and defined his rights, that the judgment against him was void because the statute makes no provision for notice, and that a surety in such case can only be proceeded against by a suit on his bond in the name of the state, is untenable.

Wickham v. Page, 49 Mo. 526.

Mo. 1879. Under 1 Wag.St. p. 81, § 67, providing for a summary proceeding against the sureties of an administrator, a judgment cannot be rendered against the sureties and their principal, when the principal has not been summoned, and when no steps were taken while he remained in office, to have the amount of money in his hands judicially ascertained, and an order for its rendition made; but, where the administrator appears on the trial de novo in the circuit court, the failure to serve him with notice and his nonappearance on the original trial in the probate court does not preclude the rendition of judgment.

Brown v. Weatherby, 71 Mo. 152.

Mo. 1882. Under Rev.St.1879, §§ 235, 236, 252, V.A.M.S. §§ 465.130, 465.140, 465.390, the probate court has jurisdiction to proceed against the sureties on the bond of an executor on the failure of the executor to pay a demand, where the bond of the executor is the statutory bond.

Newton v. Cox, 76 Mo. 352.

Mo.App. 1878. Under Wag.St. p. 81, § 67, providing that, if any administrator resign, or his letters are revoked, the probate court shall have the power, on application of his successor, to ascertain the amount of money and quantity of property in the hands of the former administrator when his term expired, and to order the rendition of the same to his successor, and to enforce such order against the administrator and his sureties for the amount of money specified in the judgment, such a proceeding may be maintained against the sureties on two separate bonds given by an administrator, when the sureties on each are liable for the whole defalcation.

Lewis v. Gambs, 6 Mo.App. 138.

⇐537. Actions.

⇐537(1). Nature and form of remedy.

U.S.Mo. 1868. A court of equity, having power to determine liability of administrator for misconduct, necessarily had equal power, to meet possible exigency of administrator's inability to satisfy decree, to settle amount which sureties on administrator's bond in such event would have to pay.

Payne v. Hook, 74 U.S. 425, 7 Wall. 425, 19 L.Ed. 260.

C.C.A.Mo. 1939. The right to sue on either a guardian's or an administrator's bond is substantially similar. Mo.St.Ann. § 396, p. 253, V.A.M.S. § 457.180.

Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 105 F.2d 496.

Mo. 1882. Though sections 67 and 68 of the Revision of 1865 are found immediately succeeding sections which relate exclusively to partnership estates (sections 52 to 66),

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yet sections 67 and 68 authorize an administrator to maintain a suit on the bond of a prior administrator based on the failure of the former administrator to account for property belonging to the estate, without reference to the question whether such estate was a partnership estate.

Babb v. Ellis, 76 Mo. 459.

Mo.App. 1909. Rev.St.1899, § 48, V.A.M.S. § 461.560, authorizing the successor of an executor or administrator to compel a final settlement and enforce the judgment against the executor or administrator and his sureties, and section 54, authorizing the successor to sue the executor or administrator and his sureties or either in any court having jurisdiction of civil actions, when construed in the light of the history of the legislation as enacted in Rev.St.1825, p. 98, § 20, give alternative remedies to the successor; and the remedy provided by section 48 must be obtained in the probate court, while the remedy under section 54 may be pursued in any court having jurisdiction of civil actions.

State ex rel. Langston v. Zorn, 119 S.W. 517, 138 Mo.App. 713.

⇐537 (2). Conditions precedent.

Mo. 1851. It has long been settled in Missouri that an action on an administration bond may be brought against a surety therein before any indebtedness has been established or any judgment rendered against the administrator. This is contrary to the rule in many of the states.

Oldham v. Trimble, 15 Mo. 225.

Mo. 1874. The failure of a public administrator, having a curator's estate in charge, to state in his petition for the sale of land the fact of a lien thereon, based on the curator's final settlement with his ward, although constituting a breach of the administration bond, does not render him liable thereon to the sureties on the curator's bond, for what they have been compelled to pay by reason of the default of the curator. The damages would be too remote.

State, to Use of Lovell, v. Todd, 57 Mo. 217.

Mo. 1880. A legatee is not damaged by a default of the executrix in failing to collect certain money from the administrator pendente lite, where there are sufficient funds to pay her legacy, and cannot maintain a suit on the bond for that reason.

State ex rel. Nichols v. Adams, 71 Mo. 620.

Mo. 1927. After order approving administrator's final settlement, widow might sue on administrator's bond, though no order of distribution was made and extent of her interest was disputed by administrator.

State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md., 298 S.W. 83, 317 Mo. 1078.

⇐537 (3). Defenses, and set-off or counterclaim.

Mo. 1852. A claim against the principal and securities on an executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity, and an indebtedness of the plaintiff to the testator in his lifetime cannot be set off against it.

State, to Use of Cowan, v. Modrell, 15 Mo. 421.

Mo. 1868. The act regulating set-offs, Rev.Code 1865, p. 602, § 3, providing that, in suits brought by administrators and executors, debts existing against their intestate or testator and belonging to the defendant at the time of his death may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased, is not applicable in an action on an administrator's bond.

Vastine v. Dinan, 42 Mo. 269.

In an action brought after the principal's death against the sureties on an administrator's bond to recover the amount due the estate, the sureties cannot set up as a set-off an indebtedness of the intestate to the principal on the bond, or a debt paid by the widow of the principal, for which the intestate's estate was liable.

Vastine v. Dinan, 42 Mo. 269.

In an action on an administrator's bond, to recover money due the estate, the administrator, even if he is an heir at law of the estate, will not be permitted to retain what he may be entitled to as such heir.

Vastine v. Dinan, 42 Mo. 269.

Mo. 1873. To a suit by an administrator de bonis non against the sureties of his predecessor to recover for moneys not accounted for, the fact that demands barred by the statute of limitations had been allowed against the estate is no defense.

State, to Use of Burrough, v. Farmer, 54 Mo. 439.

Mo. 1895. In an action at law on an executor's bond by a legatee, to recover his distributive share, an assignment by plaintiff to the executor of his interest cannot be attacked on the ground of fraud of the executor, by false representations and concealment as to the value and condition of the estate.

State ex rel. Jones v. Jones, 33 S.W. 23, 131 Mo. 194.

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Mo. 1912. A defense that another's name was signed as surety after that of defendant *held* objectionable for failure to negative the presumption that it was signed before delivery of the bond and that the principals had authority to secure other sureties.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

A defense that the name of a surety subsequently signed was a forgery *held* insufficient.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo.App. 1898. Where the receipt given by the relator, and the contract executed by him at the same time, showed a settlement between him and the administrator of his claim as heir, he being full grown and competent to make the settlement and give the receipt, and no evidence being offered to impeach the receipt, its execution not being denied, nor there being any facts tending to show that he did not execute it with full knowledge of the alleged misconduct of the administrator of which he now complains, it is a bar to recovery for such misconduct.

State, to Use of Cardwell, v. Stuart, 74 Mo.App. 182.

Mo.App. 1925. That probate records showed devisee had received her entire distributive share of proceeds of realty under order of probate court when second bond of administrator was executed, does not relieve surety from liability for administrator's prior refusal to recognize rights of beneficiary under deed of trust of devisee's undivided interest.

State, to Use of Enyart, v. Doud, 269 S.W. 923, 216 Mo.App. 480.

Mo.App. 1927. Acquiescence of probate judge and parties in interest in sale of merchandise barred recovery on administrator's bond for mismanagement.

Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

Mo.App. 1936. Sureties on executor's bond cannot question capacity in which he acts.

State ex rel. and to Use of Bremer v. Schulte, 90 S.W.2d 1078.

Mo.App. 1941. Where administrator obtained proceeds of life policy from circuit court clerk pending appeal of divorced wife of deceased in interpleader proceeding between administrator and wife involving proceeds, and paid therefrom attorney's fees and other expenses of administration, surety sued on administrator's bond by divorced wife to whom fund was eventually awarded could not assert on the one hand that surety was not liable, because as finally determined the proceeds should never have been made a part of assets of estate, and assert on the other hand that administrator had right to administer proceeds by paying therefrom attorneys' fees and other expenses of administration.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

⇐537 (4). Jurisdiction and venue.

Mo. 1836. Administration Act 1825, § 63, provides that personal representatives shall not be required to make distribution within three years, unless ordered by the county court, and until a bond is given by the distributees to refund the due proportion of any debt which may afterwards accrue. Section 64 declares that, if it appears on the settlement that there are sufficient funds to satisfy all demands against the estate, the county court shall order distribution. *Held*, that where the records of the county court show that all debts had been paid, and that the amount of the property is ascertained, and three years have elapsed since administration was granted, a distributee may maintain his action of debt in the circuit court against the sureties on the administration bond, since the sections above recited were not intended to give exclusive jurisdiction to the county court in enforcing distribution among distributees.

State, to Use of Ingram, v. Rankin, 4 Mo. 426.

Mo. 1871. Suit against the sureties on an administrator's bond was instituted in the circuit court of Dade county, but on motion of defendants was removed to the circuit court of Cedar county, where plaintiff obtained judgment. *Held*, that the latter court had no jurisdiction of the subject-matter, as the exclusive jurisdiction given to the probate court of Dade county by Sess.Acts 1845, p. 70, by implication prohibits all other courts from acting.

Dodson v. Scroggs 47 Mo. 285.

A suit on an administration bond *held* not to be a suit against "administrators upon any demand against the estate of their testator or intestate," within Acts 1865, p. 85, defining the jurisdiction of probate courts as extending to all suits against executors and administrators upon any demand against the estate of their testators or intestates.

Mo. 1873. State, to Use of Hunter, v. Maulsby, 53 Mo. 500.

Mo. 1873. State, to Use of Davis, v. Maulsby, 53 Mo. 503.

Mo. 1873. State, to Use of Bolenius, v. Waters, 54 Mo. 112.

Mo. 1878. The fact that, judgment having been rendered against an administrator

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in the probate court, execution might have been levied against him, and, if that proved barren of results, that sci. fa. might have issued against his sureties, under Wag.St. p. 109, §§ 13, 14, did not deprive the circuit court of its jurisdiction of an action against the administrator and his sureties on the administration bond.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1881. Under Acts 1859–60, p. 45, art. 4, § 1, establishing a probate court in Carroll county, such court had jurisdiction of an action on an administrator's bond.

State ex rel. Shinn v. Stafford, 73 Mo. 658.

Mo. 1882. The probate court has no jurisdiction of an action on an administrator's bond, but the circuit court is the proper forum.

State ex rel. Longdon v. Shelby, 75 Mo. 482.

⇐537(5). Time to sue, limitations, and laches.

Mo. 1832. The security on an administrator's bond may be sued as soon as the principal commits a breach, and before his conviction thereof.

Devore, to Use of Simonds, v. Pitman, 3 Mo. 179, 182.

The rule that limitations do not run against the state does not apply to a suit on an administration bond taken in its name for the use of individuals.

Mo. 1843. State, to Use of Menard, v. Pratte, 8 Mo. 286, 40 Am.Dec. 140.

Mo. 1843. State, to Use of Zeigler, v. Pratte, 8 Mo. 288.

In an action by a creditor on an administration bond, it is a good plea that a cause of action did not accrue within 10 years.

Mo. 1843. State, to Use of Menard, v. Pratte, 8 Mo. 286, 40 Am.Dec. 140.

Mo. 1843. State, to Use of Zeigler, v. Pratte, 8 Mo. 288.

Mo. 1847. The right of action on an administrator's bond for failure to account for money received by him accrues as soon as the failure occurs.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

Mo. 1848. An action may be brought on an administrator's bond within three years after he has been appointed, and he can be compelled to make distribution by an order of the county court any time after one year from his appointment, without any bond to refund.

State, to Use of Collins, v. Stephenson, 12 Mo. 178.

Mo. 1856. A suit upon an administrator's bond to the state or governor does not lie in favor of a creditor or others interested until his claim be otherwise established. Therefore the statute limiting the time for bringing such suits does not begin to run till after a judgment establishing such claim, or the allowance of the claim by the proper probate court in accordance with Rev.Code 1825, tit. "Administration," § 52.

State, to Use of Morrison's Adm'r, v. St. Gemme's Adm'r, 23 Mo. 344.

Mo. 1860. Where a widow became administratrix of her husband's estate, and, while officiating as such, certain slaves belonging to said estate were set apart and assigned to her as her separate property under a void and irregular order of the county court, in pursuance of which she converted them to her own use, *held*, in a suit upon her administration bond, that the statute of limitations did not run in her favor, against a claim for such conversion, while she continued administratrix.

State, to Use of Morrison's Adm'r, v. St. Gemme's Adm'r, 31 Mo. 230.

Mo. 1869. Gen.St.1865, c. 120, § 49, limiting actions against the sureties of administrators to seven years, is restrictive in its character, and was framed on the evident hypothesis that the general limitation act provided a longer time in which such suits could be brought.

Martin v. Knapp, 45 Mo. 48.

Mo. 1887. An action by general legatees against the sureties on the executor's bond is barred when commenced 22 years after the right of action has accrued by payment of the specific legacies, and of all debts except those barred by lapse of time, and by the expiration of the time allowed for contesting the will.

State ex rel. Fagan v. Grigsby, 5 S.W. 39, 92 Mo. 419.

Mo. 1894. An action by an heir against an administratrix and the sureties on her bond, to recover the proceeds of a sale of stock on hand when the intestate died, and which were not reported to the probate court, and did not enter into her final settlement, is not barred until ten years after such settlement, though plaintiff arrived at his majority five years after the settlement.

Nelson v. Barnett, 27 S.W. 520, 123 Mo. 564.

Mo. 1908. The existence of a small unpaid allowance in favor of a creditor of a decedent's estate at the commencement of an action by the distributees for a breach of the administrator's bond does not render the action premature, where the allowance is

paid by a distributee before the filing of the amended petition, in which all claim to reimbursement therefor is waived.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1912. The action is subject to the seven-year limitation prescribed by Rev.St. 1909, § 63, V.A.M.S. § 461.630, and not to the two-year limitation for filing claims provided by section 191, and it accrued on the revocation of the prior executors' letters.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo. 1937. Residuary legatee may sue on administrator's or executor's bond in circuit court before final settlement of estate, if estate debts have been paid. Mo.St.Ann. § 18, p. 18; § 19, p. 19; §§ 282, 279, p. 175, V.A.M.S. §§ 461.260, 461.270, 461.290, 465.250.

Smith v. St. Louis Union Trust Co., 104 S.W.2d 341, 340 Mo. 979.

Mo.App. 1890. The cause of action on the bond of a public administrator accrued to the heirs of his intestate at the date of final settlement, even though there was no order of distribution, and though the administrator could retain the amount found due the estate on final settlement before turning it over to the state, under Rev.St.1879, §§ 258, 265 (Repealed Laws 1899, p. 41), and therefore an action on such bond, commenced more than 10 years after the date of the final settlement, was barred.

State ex rel. McGeever v. Shires, 39 Mo. App. 560.

Mo.App. 1899. It is a familiar rule of statutory construction that, where an enumeration of particular things is followed by a general word or phrase, the latter must be held to refer to things of the same kind as specified. Applying this rule to Rev.St. § 6776, V.A.M.S. § 516.130, which requires that an action against a sheriff, coroner, "or other officer," upon a liability incurred in doing an act in his official capacity, shall be commenced within three years after the action accrues, it becomes plain that the term "other officer" has no reference to a public administrator.

State ex rel. Catron v. Ennis, 79 Mo.App. 12.

The three-year limitations, provided by Rev.St. § 6776, V.A.M.S. § 516.130, does not apply to an action against a public administrator and the sureties on his bond. Rev. St. § 300, V.A.M.S. § 461.840, relating to public administrators, places them in the class to which administrators, executors, and guardians belong, and thereby renders applicable to him the ten-year statute of limitations.

State ex rel. Catron v. Ennis, 79 Mo.App. 12.

Mo.App. 1909. An action by an administrator de bonis non on the original administrator's bond and against the sureties as authorized by Rev.St.1899, § 54, V.A.M.S. § 461.620, is barred under section 55 in seven years from the revocation of the letters, and section 276 (page 433), authorizing actions on bonds of executors for waste, etc., does not apply, and the action is not governed by section 4272 (page 2347), providing that actions on written instruments shall be brought within ten years.

State ex rel. Langstron v. Zorn, 119 S.W. 517, 138 Mo.App. 713.

⇐537(6). Persons entitled to enforce liability.

Mo. 1847. A guardian of infant distributees may sue in the name of the state on an administrator's bond.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

An heir or distributee may sue on the administrator's bond for a failure to account for money received by him.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

Suit may be brought on a bond of an administrator in the name of the state by any person injured.

State, to Use of Adams, v. Campbell, 10 Mo. 724.

Mo. 1908. The distributees of an estate, after the debts are all paid, have their right of action on the administrator's bond, whether final settlement by him or order of distribution by the probate court has been made or not.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1912. An administrator de bonis non may sue on the bond of his predecessor for assets in his hand for which he has failed to account.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

He may sue either by action in the circuit court or by summary proceedings in probate, whether the predecessor has made a settlement showing assets in his hands or not.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo.App. 1903. A creditor of a decedent, who has received his pro rata share of the estate, is not entitled to recover on the admin-

istrator's bond on account of any breaches thereof.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 74 S.W. 1032, 100 Mo.App. 481.

Mo.App. 1939. Administratrix de bonis non of estate of deceased veteran's father was not proper party to maintain action against surety on bond of veteran's administrator to recover proceeds which administrator had received under war risk policy in which father was named beneficiary, and for which administrator had failed to account, but proper party to recover proceeds was administrator de bonis non of veteran's estate. 38 U.S.C.A. § 514.

State ex rel. Lankford v. Fidelity & Deposit Co. of Maryland, 123 S.W.2d 552, 232 Mo.App. 979.

Mo.App. 1944. A decedent's widow had no right to sue administratrix and surety on her bond for amount of decedent's savings bank deposit, collected by administratrix and not accounted for or administered on, as such amount belonged to decedent's estate, not to widow.

State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

⇐537 (7). Parties and process.

C.C.Mo. 1880. An administrator and his sureties may be joined in a suit against the administrator for an account and settlement, and for judgment against the sureties for the balance found due upon the settlement of such account.

Donohue v. Roberts, 1 F. 449.

Mo. 1822. The statute giving any party who may be interested a right to sue on an administrator's bond does not mean by the word "party" all persons interested, but that any person may sue and recover according to his right; and hence a judge of probate, suing an administrator on a bond executed to him, need not bring his action to the use of all the representatives jointly.

Oliver v. Crawford, 1 Mo. 263.

Mo. 1825. The statute provides that an administrator's bond may be put in suit and prosecuted from time to time at the suit of the party injured in the name of the governor; and hence a party injured cannot sue an administrator on a bond executed to the governer, but must bring his action in the governor's name.

Spear v. Thompson, 1 Mo. 581.

Mo. 1832. An administration bond is joint and several, and may be put in suit by any person aggrieved against one or all of the obligors.

Devore, to Use of Simonds, v. Pitman, 3 Mo. 179, 182.

Mo. 1834. An administrator's bond, executed in 1813 under the territorial government of Missouri to the judge of probate, must, in 1830, be sued on in the name of the state of Missouri; the state, by virtue of the Act of 1825 relating to executors and administrators, being the successor in office for this purpose of the judge of probate, within the meaning of section 4 of the schedule of the Constitution, providing that all bonds executed to the governor of the territory, or any other officer or court, in official capacity, shall pass over to the governor or other state authority, and to their successors in office, for the uses therein respectively expressed.

Governor of Missouri, to Use of Evans, v. Hays, 3 Mo. 434.

A prior and subsequent administrator of the same estate cannot be sued jointly on their separate bonds.

Governor of Missouri, to Use of Evans, v. Hays, 3 Mo. 434.

An action on an administrator's bond, in which the state is an obligee, must be brought in the name of the state.

Mo. 1847. State, to Use of Adams, v. Campbell, 10 Mo. 724.

Mo. 1857. Sickles v. McManus, 26 Mo. 28.

Mo. 1879. Woodworth v. Woodworth, 70 Mo. 601.

Mo. 1864. The heirs of an intestate estate cannot maintain an action to recover unadministered assets, upon the bond of the administratrix, after her removal by marriage and the appointment of an administrator de bonis non, although the debts are all paid, until distribution is ordered. She and her securities are liable to the administrator de bonis non, and the remedy of the plaintiffs is against the latter.

State, to Use of Coste, v. Fulton, 35 Mo. 323.

Under the statutes (1 Wag.St. p. 77, §§ 46, 47), which provide that where an administrator dies or resigns, or his letters are revoked, the succeeding administrator shall stand in the same attitude as his predecessor, if an administrator die the administrator de bonis non is the proper person to sue for, recover, and take charge of the assets belonging to the estate. He is thenceforth accountable to the creditors of the estate, and a creditor cannot sue for his entire debt on the bond of the deceased administrator.

Mo. 1870. State ex rel. Collins v. Dulle, 45 Mo. 269.

Mo. 1870. State ex rel. Crow v. Cox, 45 Mo. 311.

Mo. 1874. If an estate owes no debts, distributees, after the removal of the admin-

istrator, may join and bring suit on the administrator's bond before final settlement, and without the appointment of an administrator de bonis non.

State, to Use of Kelley, v. Thornton, 56 Mo. 325.

In an action by the state on an administrator's bond, before the order of distribution, several distributees may join as relators, under Wag.St. p. 1000, §§ 4, 6.

State, to Use of Kelley, v. Thornton, 56 Mo. 325.

Mo.App. 1877. Necessity in action against a surety on an administrator's bond of joining the principal or co-sureties. See,

State, to Use of Messick, v. Richmond, 3 Mo.App. 572, memorandum.

Mo.App. 1879. The sureties of an administrator, being liable to the defendant in an action brought by the administrator to recover the possession of personal property, and in which action judgment is rendered against the administrator, the surety on the delivery bond, who has paid the judgment and been subrogated to the rights of the defendant, is entitled to recover the amount of the judgment from the sureties of the administrator.

State, to Use of Walsh, v. Dailey, 7 Mo. App. 548.

⇐537 (8). Pleading.

Mo. 1826. Where the sureties of an administrator pleaded his death before the time for the filing of an inventory, and in the same plea denied that goods, etc., came into his hands, the first part of the plea was not traversable.

Scott v. Governor of Missouri, 1 Mo. 686.

Mo. 1828. In an action on an administration bond, where a declaration assigned as a breach the administrator's failure to make annual and final settlements of his accounts, it is a sufficient assignment of the breach.

Devore, to Use of Simonds, v. Pitman, 3 Mo. 179, 182.

Mo. 1845. If one of two breaches alleged in one count in an action on an administrator's bond is defective, the remedy is to move to exclude the evidence relating to it.

State, to Use of Darland, v. Porter, 9 Mo. 356.

Mo. 1845. In an action on an administrator's bond, after his death, against the sureties, it is a sufficient breach that the administrator did not account for and pay over money received by him, and that since his death his legal representatives have not paid over the same, without any averment that the deceased has not an executor or administrator.

Finney v. State, 9 Mo. 632.

Mo. 1852. A petition against an executor and his securities, on their bond, alleging waste and a refusal to pay a demand allowed by the county court, must aver an order of court for its payment, or that assets have come to the hands of the executor which ought to have been, or could lawfully be, applied to its payment.

State, to Use of Cowan v. Modrell, 15 Mo. 421.

Mo. 1854. A petition against the executor of a deceased executor for breach by the decedent of his bond as executor should allege that neither the deceased executor in his lifetime, nor his executor since, had performed the acts required by law or the order of the court, nonperformance of which is alleged to constitute the breach.

State, to Use of Hay's Adm'r, v. Petticrew's Ex'r, 19 Mo. 373.

Mo. 1866. A suit in the name of the state to the use of the administrators de bonis non of the estate of D. was instituted against the sureties upon the bonds of the former administrators. The petition contained no averment of the right of the parties to sue, but in the caption they were designated as above. *Held*, that the petition was fatally defective.

State, to Use of Tapley's Adm'rs, v. Matson, 38 Mo. 489.

Mo. 1878. In a suit on an administrator's bond, where the answer filed by the sureties is a plea of non est factum, evidence as to the execution of a prior bond by other sureties is inadmissible.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

The petition on an administrator's bond showed that there had been a final settlement of the estate, and that the probate court had adjudged a certain sum to be owing from the administrator, and had ordered him to pay over that sum, but that he had failed to make such payment. *Held* to sufficiently allege a breach of the bond.

State ex rel. Frost v. Creusbauer, 68 Mo. 254.

Mo. 1878. Averment in the petition in a suit on an administrator's bond, that the bond was forfeited, "in that B. [the administrator] did not and has not turned over to plaintiff the said sum * * * as by the condition of his said bond and the order of said probate court he was in duty bound to do," was

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a sufficient allegation of the breach of the bond.

State, to Use of Edwards, v. Bartlett, 68 Mo. 581.

Mo. 1882. In an action on an administrator's bond, an amendment to the petition in the caption thereof, by substituting the words "State, on the Relation and to the Use of L., Plaintiff," instead of "L., Plaintiff," was properly admitted.

State ex rel. Longdon v. Shelby, 75 Mo. 482.

Mo. 1882. A petition in an action on the bond of a public administrator alleged that the public administrator failed to account for a specified sum, though the county court by its order directed him to pay the same over to his successor in office, that the successor demanded payment, and that payment was not made. *Held*, that the petition stated a cause of action, it not being necessary, in pleading the orders of a county court, to aver the facts on which the orders were based, notwithstanding the fact that Wag.St. pp. 122, 124, §§ 12, 25, do not require a public administrator to turn an estate in his hands at the end of his term over to his successor.

State ex rel. Guenther v. King, 76 Mo. 510.

Mo. 1883. In a suit on an executor's bond, the statement in the petition that defendants became bound unto the state of Missouri in the sum of $30,000 by their certain writing obligatory, standing alone, might be regarded as a conclusion of law, and therefore insufficient to show that defendants executed the writing; but an accompanying allegation that defendants bound themselves to pay said sum is clearly the averment of an issuable fact, and, taken as a whole, it is tantamount to an averment that defendants by their certain writing obligatory, sealed with their seals, bound themselves to pay to the state of Missouri the said sum.

State ex rel. Phillips v. Rush, 77 Mo. 586.

Mo. 1883. The complaint in an action on an administrator's bond averred that he sold cattle to W. for $825; that he wholly failed to take from W. a note with security, or any note whatever; that said W. has failed and refused to pay said sum, and has, since said sale, became wholly insolvent; that the administrator never took any steps to secure the payment of said sum, or to collect the same from W. At the trial evidence was admitted to show that an uncollectible note was taken. *Held*, that the evidence was admissible under the allegations.

State ex rel. Griggs v. Edwards, 78 Mo. 473.

Mo.App. 1905. A petition on an administrator's bond, assigning as the breach the administrator's failure to inventory and account for all the assets of the estate in his hands, and the conversion of a part of such assets to his own use, states a cause of action, without further alleging that a settlement and release relied upon in defense was obtained by fraud.

State ex rel. Cardwell v. Stuart, 86 S.W. 471, 111 Mo.App. 478.

Mo.App. 1919. In the absence of an allegation that money paid out was not paid out on items allowed by the probate court in an action against an administratrix and her sureties, it will be presumed on demurrer that the money was lawfully paid out.

State ex rel. Lamm v. Lamm, 216 S.W. 332.

Mo.App. 1927. Petition alleging counterclaim offered in probate was not counterclaim and was fraud and cheat *held* not to state cause of action against sureties of public administrator. V.A.M.S. §§ 509.050, 509.490, 509.500, 509.510.

State ex rel. Johnston v. Hiller, 295 S.W. 132.

Mo.App. 1931. In action on executor's bond, that plaintiff had filed claim in probate court and that claim was denied was matter of defense which must be pleaded.

Nye v. U. S. Fidelity & Guaranty Co., 37 S.W.2d 988, 225 Mo.App. 593.

Mo.App. 1944. In action for breaches of administratrix' bond, allegation of petition that administratrix neglected, failed, and refused to pay relatrix' statutory allowance and allowance for year's provisions, as ordered by probate court, was insufficient, in absence of allegation that administratrix ever had money in her hands with which to pay such allowances.

State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

In action by decedent's widow for breaches of administratrix' bond, allegation of petition that administratrix failed to account for decedent's cash in savings bank, as inventoried in estate, was insufficient, in absence of allegation that such cash ever came into administratrix' hands and in view of prior allegation that she had administered on estate and made final settlement. Mo.R.S.A. § 213, V.A.M.S. § 465.010.

State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

⇐537 (9). Evidence.

Mo. 1829. In an action against an administrator for wasting the funds of an in-

solvent estate by expending them in improving the real estate, evidence is admissible to show the increased value of the estate, under an agreement permitting the defendant to make use of any equitable defense he may have.

Byrd v. Governor of Missouri, 2 Mo. 102.

Mo. 1830. In an action on an administrator's bond for failure to render a true inventory and account of the goods and chattels, rights and credits, of the deceased, evidence that the administratrix was seen in possession of money left with her by her husband prior to his death, and money supposed to be his, brought to her by a person sent to ascertain the circumstances of his death, was properly admitted.

Governor of Missouri, to Use of Chamberlain's Creditors, v. Byrd, 2 Mo. 194.

Mo. 1853. In an action on an administrator's bond, the breach assigned being the failure of the administrator to account for assets of the estate and the conversion of them to his own use, where the plea was the statutory plea of the general issue, it was *held* that proof that the assets had come into the administrator's hands did not make a prima facie case for the plaintiff.

State, to Use of Renfro's Adm'rs, v. Price, 17 Mo. 431.

Mo. 1870. In an action against the sureties on an administration bond for the failure of the administrator to account for the assets of his intestate's estate, evidence of the sale of the estate, and the amount received therefor, is competent, although such sale was made without the requisite order of the probate court.

State, to Use of Peppler, v. Scholl, 47 Mo. 84.

Mo. 1872. The evidence offered by plaintiff in a suit against an administratrix and her sureties on her bond considered, and *held* unobjectionable, and sufficient to make out the case stated in the petition.

State ex rel. Smith v. Bruns, 50 Mo. 290.

Mo. 1878. In an action on an executor's bond, a judgment recovered by plaintiff against the sureties on a second bond was not admissible, as tending to show an admission on the part of plaintiff that the dereliction of the executor occurred wholly during the existence of the second bond.

State, to Use of Wolf, v. Berning, 6 Mo. App. 105, affirmed 74 Mo. 87.

Mo. 1880. In an action by an administrator de bonis non on the bond of a former administrator, based on the ground of the failure of the former administrator to collect claims due to the estate, evidence examined, and *held* to support a finding that the former administrator was not guilty of negligence in failing to collect such claims.

State ex rel. Steers v. Taylor, 72 Mo. 656.

Mo. 1882. In an action on the bond of an administrator for failure on the part of the administrator to account for property belonging to the estate, statements made by the administrator to the probate judge to the effect that he held certain money as administrator were admissible, not as conclusive of the fact, but as competent evidence of the fact of the administrator holding such money.

Babb v. Ellis, 76 Mo. 459.

In an action on an administrator's bond, based on the failure of the administrator to account for moneys belonging to the estate, evidence of a statement made by a party to the bond and to the suit thereon, admitting in effect that the administrator held certain money as money belonging to the estate, was admissible against him.

Babb v. Ellis, 76 Mo. 459.

On the issue whether a commissioner, selling real estate in a partition suit, transferred the proceeds of the sale to himself as administrator of the deceased owner of the estate, evidence examined, and *held* to warrant a finding that a transfer of the proceeds of the sale was made, rendering the sureties on the bond of the administrator liable for the administrator's failure to account for such proceeds.

Babb v. Ellis, 76 Mo. 459.

Mo. 1908. Secret sales of corporate stock at extraordinary prices paid by rival interests seeking to obtain control of the corporation do not establish market value, and therefore evidence thereof is not competent on an issue as to whether an administrator acted with prudence and skill in selling such stock for a less price at a private sale without order of the probate court.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Evidence of individual offers to buy and sales of corporate stock, being admissible to show market value, is competent on an issue as to whether an administrator acted with prudence and skill in selling such stock at private sale without order of the probate court.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

In an action against an administrator for damages resulting from selling stock belonging to the estate at private sale without or-

der of the probate court, defendant may show what the market value of the stock was up to the delivery to the purchaser and the exceptional circumstances under which it advanced and the conditions under which he agreed to sell it for the price received as evidence of his good faith, prudence, and skill in selling it.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

The judgement and conduct of distributees in directing an administrator to sell stock belonging to the estate at private sale without order of the probate court may be considered in passing upon his prudence and skill in selling it.

State ex rel. Wann v. Dickson, 111 S.W. 817, 213 Mo. 66.

Mo. 1912. Evidence that the executors were insolvent two and one-half years or more after they took charge of the estate *held* inadmissible.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo.App. 1877. In a proceeding on a scire facias against a surety on an executor's bond, based on the ground that the executor had failed to satisfy an execution issued against him, the execution, which recited the order of distribution, was offered in evidence; but the order of distribution in the probate court, by which the executor was directed to pay to plaintiff the amount shown by his balance to be due, was not offered in evidence. *Held* that the order of distribution was an essential element to the case of plaintiff, and its existence would not be presumed from its recital in an execution from the probate court.

Wolff v. Schaeffer, 4 Mo.App. 367.

Mo.App. 1877. Proof requisite to a prima facie case in an action on an administrator's bond. See, State, to Use of Loring, v. Huther, 4 Mo.App. 575, memorandum.

Mo.App. 1878. In an action against the sureties on the bond of a public administrator, the annual settlements of the administrator were properly admitted in evidence, although not conclusive against the sureties.

Lewis v. Gambs, 6 Mo.App. 138.

Mo.App. 1895. Testatrix devised her estate to her brother for life, with power to invest to his own interest, and after his death to her sister. The brother was nominated as executor, and had the will probated, with defendants as sureties on his bond. Notice of the final settlement was given, and afterwards the settlement was filed, but was not then approved. A nunc pro tunc order of approval was entered, however, about nine years afterwards, on petition of one of the defendants. On the death of the executor many years afterwards, the public administrator brought action against defendants, under Rev.St.1889, §§ 40, 50, V.A.M.S. §§ 461.570, 461.580, to ascertain the amount of money or property, belonging to the estate, which had come into the hands of the executor and was unaccounted for. *Held*, that a judgment for the sureties was proper; the presumption being that the debts were paid during the time allowed for settlement, and the balance in the executor's hands then belonged to him as life tenant or first taker, and the sureties were discharged from liability therefor.

Fielder v. Rose, 61 Mo.App. 189.

Mo.App. 1898. Where one was an executor under the will, and also a special commissioner appointed by the court to sell the real estate under the will, and gave bonds in both capacities, and died without making any settlement as to the proceeds received from the sale about four months after the receipt of the money by him as commissioner, and long after he had mixed it with his individual funds, and where he, in writing up his account as executor in his individual books, took credit for the amount thereof, it showed such an intent to charge himself with the funds as executor as to render his bond as executor liable for his default.

Lincoln Trust Co. v. Tracy, 77 Mo.App. 96.

Mo.App. 1902. Where a public administrator succeeds himself, and gives a new bond, on an issue whether moneys received during the life of the first bond were misappropriated under the second, it being shown by settlements during the life of the second bond that the estate was in his hands, such settlements, in the absence of controverting evidence, raise a presumption that the estate was not then misappropriated.

State ex rel. Rutledge v. Holman, 67 S.W. 747, 93 Mo.App. 611.

Mo.App. 1915. In action against surety on bond of public administrator and ex officio guardian, for guardian's conversion of minor ward's estate, defalcation presumed to have occurred while bond was in effect and to require surety to show that it took place before that time.

State ex rel. and to Use of King v. United States Fidelity & Guaranty Co., 176 S.W. 543, 188 Mo.App. 705.

Mo.App. 1922. In proceedings against an administrator and the surety on his bond, evidence that the only assets of the estate consisted of stock in a corporation which had sold all its property, and devoted the proceeds to the payment of its debts, and that

the administrator had tendered to his successor the certificates of stock belonging to the estate, *held* not to show that the administrator had received property not accounted for, and for which his surety would be liable.

Mississippi Valley Trust Co. v. Taylor, 238 S.W. 558.

Mo.App. 1934. Admission in evidence of contract by widow of deceased soldier's father, named beneficiary in war risk insurance policy, to release insured's estate and grandfather from all her claims in consideration of payment of stated sum by grandfather, *held* not error warranting reversal of judgment for defendant in widow's action against surety on administrator's bond for balance due her; such contract being some evidence of what she indirectly received from estate.

State ex rel. Lankford v. Fidelity & Deposit Co. of Maryland, 74 S.W.2d 904, 228 Mo.App. 953.

Mo.App. 1944. In action for breaches of administratrix' bond, fact that bond in sum of $10,000 was required did not warrant inference that personal property in decedent's estate was worth at least $5000, so as to entitle relatrix to recover for breach of bond in failing to pay $400 statutory allowance and $1,200 allowed for year's provisions, in view of other allegations and failure to allege when inventory was made, what it showed, or whether any personal property reached administratrix' hands. Mo.R.S.A. § 18, V.A. M.S. § 461.260.

State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

⇐537 (10). Trial.

C.C.Mo. 1880. It cannot be determined upon demurrer whether such sureties are liable for the alleged fraud and collusion of the administrator in the proof and allowance of his own individual claim against the estate of his intestate.

Donohue v. Roberts, 1 F. 449.

Mo. 1901. One who had been for two terms public administrator, was sued, together with his sureties for his second term, by the state, on relation of his successor in office, to recover moneys belonging to an estate administered by defendant, and the answer of all the defendants was a general denial. *Held*, that it was proper to refuse to instruct that the sureties were only liable for such sums as came into the ex-administrator's hands after the execution of the bond for his second term of office, such defense not being embraced within the answer.

State ex rel. Gordon v. Kennedy, 63 S.W. 678, 163 Mo. 510.

⇐537 (11). Amount of recovery.

Mo. 1849. Where an administrator, who was sued on his bond, agreed with the plaintiffs that judgment should be rendered against him for a certain amount, and that there should be set off on the execution whatever the county court should find due to him, and the county court brought him in debt to the estate, it was *held* that execution should issue for the amount of such indebtedness.

Wilkson v. State, to Use of Stong, 12 Mo. 353.

Mo. 1854. A legatee, suing an administrator on his bond, is not entitled, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees or of creditors.

State, to Use of Reyburn, v. Ruggles, 20 Mo. 99.

In a suit by legatees on an administrator's bond, judgment should be entered for the penalty, and a single execution awarded for the damages assessed for the breaches.

State, to Use of Reyburn, v. Ruggles, 20 Mo. 99.

Mo. 1912. In an action on an executor's bond for a devastavit, by administratrices de bonis non, plaintiffs were entitled to recover interest.

State ex rel. Welch v. Morrison, 148 S.W. 907, 244 Mo. 193.

Mo.App. 1905. Where an administrator was guilty of maladministration, had failed to require security on sales of assets, and had paid claims which had not been proved, and the estate was insolvent, a creditor in an action on the administrator's bond was only entitled to recover the difference between what he had received and what he should have received if there had been no breach of the bond.

State ex rel. L. Bauman Jewelry Co. v. Taylor, 87 S.W. 7, 112 Mo.App. 585.

Mo.App. 1914. Where testator bequeathed personal property to a daughter and the heirs of her body, and she died without having received the same from the executors, her heirs were only entitled to interest in an action on the executors' bond, from the date of their mother's death.

State ex rel. Farley v. Welsh, 162 S.W. 637, 175 Mo.App. 303.

Mo.App. 1917. In heir's action on executor's bond, seeking to establish right to share in estate, she was not entitled to interest from date of distribution, if made to other persons in bona fide belief that they, and not plaintiff, were entitled to share, and plaintiff made no demand until bringing of action.

State ex rel. and to Use of Lust v. Lust, 197 S.W. 172.

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In action on executor's bond, judgment for plaintiff, who claimed share in estate, would not be reduced in the amount of the pro rata liability of plaintiff's ancestor on the administrator's bond.

State ex rel. and to Use of Lust v. Lust, 197 S.W. 172.

Mo.App. 1944. In action by decedent's widow for breach of administratrix' bond by failure to pay widow amount collected by administratrix on mortgage note, payable to decedent and widow, for larger sum, plaintiff was not entitled to recover full face amount of note, in absence of charges of conversion by and negligence of administratrix or allegations of demand by widow for delivery of note to her, administratrix's refusal, widow's claim of ownership of note, value thereof, or maker's solvency or insolvency.

State ex rel. Hendrix v. American Surety Co. of New York, 176 S.W.2d 67.

⇐537 (12). Judgment and review.

U.S.Mo. 1868. In suit by one distributee of intestate against administrator and his sureties, should suit terminate against the defendants, court could do substantial justice to all parties in interest and prevent multiplicity of suits by allowing other distributees to come in and share benefit of litigation, either through reference to master or some other proper proceeding.

Payne v. Hook, 74 U.S. 425, 7 Wall. 425, 19 L.Ed. 260.

Mo. 1856. Plaintiffs sued an administrator de bonis non and the surety on his administration bond. The court found that the first administrator recovered certain judgments and took out an execution, which was returned by his order; that the debtor was then solvent; and that the judgments were existing assets of the estate on the appointment of the second administrator. It was not stated that the debtor was solvent on the second administrator's appointment, or that he had notice of the existence of the judgments. *Held*, that the appellate court could not infer from the finding that the second administrator had notice of the existence of the judgments, or that the debt was lost through his negligence, and hence a judgment against him and his sureties should be reversed.

State, to Use of Reyburn, v. Ruggles, 23 Mo. 339.

Mo. 1860. In a suit against the securities in an administrator's bond for a failure of the administrator to pay over a balance found due on settlement, one of the securities resisted successfully on the ground that the settlement was a nullity. *Held*, that the plaintiff was entitled, as against the other defendants against whom a judgment by default had been rendered, to nominal damages only.

State, to Use of Mueller's Adm'r, v. Reinhardt, 31 Mo. 95.

Mo. 1881. In an action on an executor's bond for conversion of the assets of the estate, an objection that the petition fails to describe the particular assets converted, if valid, cannot be raised by motion in arrest.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Where, in an action on a bond, all the breaches alleged really constitute but one cause of action, it is not necessary for the judgment to specify the breach on which the finding is made.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Under Wag.St. p. 76, § 39, providing that the giving of an additional bond by an executor shall relieve the sureties on the first bond of all liability for misconduct occurring after the filing of the second bond, a recovery on the second bond is no bar to a recovery on the first bond for misconduct occurring before the filing of the second bond.

State, to Use of Wolf, v. Berning, 74 Mo. 87.

Mo.App. 1917. The original action on the executor's bond being to establish share in estate on behalf of plaintiff, defendants could not seek decree that other heirs were not entitled to share.

State ex rel. and to Use of Lust v. Lust, 197 S.W. 172.

Mo.App. 1922. Judgment rendered for plaintiffs for the penalty of a bond in the penal sum forfeited with cost, and specifying the amount of damages assessed and finally adjudging that plaintiffs have damages so assessed and for cost, was proper as to form, under Rev.St.1919, § 1033, V.A.M.S. § 522.230.

State ex rel. Pargeon v. McPike, 243 S. W. 278.

⇐537 (13). Costs.

Mo. 1942. In view of the conflict of authority as to liability of surety on administrator's bond for property belonging to a third person taken by administrator under claim that it is an estate asset and particularly liability for portion of proceeds of such property expended for administration costs and expenses allowed by the probate court, surety was justified in litigating question of liability for portion of proceeds of life poli-

cy expended by administrator prior to ultimate award thereof by appellate court to deceased's divorced wife, and hence surety was not liable for assessment of attorney's fees or other damages in favor of wife for vexatious refusal to pay.

State ex rel. and to Use of Gnekow v. U. S. Fidelity & Guaranty Co., 163 S. W.2d 86, 349 Mo. 528.

Mo.App. 1941. In action by deceased's divorced wife against surety on administrator's bond to recover proceeds of life policy, amounting to $935.96, paid by circuit court clerk to administrator pending wife's appeal in interpleader proceeding between administrator and wife involving proceeds, which appellate court awarded to wife, assessment against surety of $150 attorney's fee as for vexatious refusal to pay, was proper, where administrator had wrongfully refused to return to wife that part of proceeds, amounting to $238.88, expended by administrator for attorney's fees and other expenses of administration.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

$150 attorney's fee awarded against surety on administrator's bond for vexatious refusal to pay proceeds of insurance policy awarded to wife of deceased was not inadequate in view of amount involved and the issues.

State ex rel. Gnekow v. U. S. Fidelity & Guaranty Co., 150 S.W.2d 581.

XIV. EXECUTORS DE SON TORT.

⇐538. Acts which constitute one executor de son tort.

Mo. 1835. There may be an executor de son tort, although there be a rightful administrator.

Foster v. Nowlin, 4 Mo. 18.

Mo. 1852. A. and B. were living together in a tent in the unsettled mining portion of California. A. died, leaving gold, a few articles of wearing apparel and some tools. B. sold the wearing apparel and tools, and started with the gold for Missouri, where both parties had their domicile, having first had it weighed, and a memorandum of its value made by persons who were acquaintances of A., and residents of the same county in Missouri, and who sanctioned B.'s proceedings. At New Orleans, A.'s gold was stolen from the steamboat on which B. had taken passage. *Held*, in a suit by A.'s administrator against B. to recover the value of the gold and other property of A., that B. did not, considering the state of affairs in California at that time, become an executor de son tort by intermeddling with the goods of A.

Graves' Adm'r v. Poage, 17 Mo. 91.

Mo. 1853. The defendant, at the request of the widow of a deceased person, sold certain effects, and with the proceeds paid the funeral expenses, and then tendered to the widow the surplus. *Held*, that by so doing he did not render himself executor de son tort.

Magner v. Ryan, 19 Mo. 196.

Mo. 1863. Where a widow in good faith, but without authority, assumed the administration of her intestate husband's property, and procured the lease to herself of premises previously leased to her husband, but forfeited for nonpayment of rent, paying the back rent and building upon a portion of them, with money of the estate, she was *held* to hold it as trustee, for the benefit of the estate.

Lich v. Bernicker, 34 Mo. 93.

Mo. 1890. Under the probate system of Missouri there can be no executor de son tort, and a creditor of a decedent cannot recover his debt from one who wrongfully appropriates and converts to his own use the assets of the estate; the statutes regulating the management and settlement of estates providing for the classification and payment of claims in a stated order, and making ample and sufficient provision for any emergency which may possibly arise during administration.

Rozelle v. Harmon, 15 S.W. 432, 103 Mo. 339, 12 L.R.A. 187, affirming 29 Mo. App. 569.

Mo.App. 1907. An antenuptial contract stipulated that the property of the wife should remain her separate property. After her death the husband took possession thereof and managed the same as his own. *Held*, that he occupied the position of administrator de son tort, and must be deemed to have dealt with the property as trustee for the heirs of the wife.

Rougtell v. Strode, 103 S.W. 510, 126 Mo.App. 348.

Mo.App. 1911. On appeal to the circuit court from an order of the probate court allowing the settlement of a public administrator, where the allowances claimed are challenged for the reason that he acted without authority, the question of his good faith in taking charge of the estate is necessarily involved, and he will not be chargeable as administrator de son tort if he took possession lawfully or under color of title, in good faith, believing his title to be superior to that of

the lawful executor, though his title proved indefensible.

In re Berger's Estate, 183 S.W. 96, 152 Mo.App. 663.

Mo.App. 1945. One who is not a personal representative of a deceased person may set up this fact as a defense to an action against him as such unless he has done some act which will estop him to deny his representative capacity.

Foster v. Wright, 187 S.W.2d 974, 239 Mo.App. 386.

⇐539. Operation and effect of unauthorized acts.

Mo. 1873. An administrator cannot be compelled by third parties to perform contracts made by them with an executor de son tort of the same estate.

Barr v. Cubbage, 52 Mo. 404.

⇐540. Liabilities to rightful executor or administrator.

Mo.App. 1885. A widow, who was not appointed administratrix of her late husband's estate, but nevertheless took personal property into her control and possession, was liable in her lifetime, as an executrix de son tort and her estate was liable after her death to a duly appointed administrator of the deceased husband's estate for the amount of a note belonging to the estate and collected by her.

Swift v. Martin, 19 Mo.App. 488.

⇐541. Liabilities to creditors.

For cases from other jurisdictions, see other Key Number Digests.

⇐543. Effect of subsequent administration by executor de son tort.

Mo. 1853. The previous acts of an executor de son tort are legalized by his taking out letters of administration.

Magner v. Ryan, 19 Mo. 196.

⇐544. Actions.

Mo. 1835. Where a defendant, sued as executor de son tort, claims the property sued for under a sale by the intestate in his lifetime to him, the plaintiff may give in evidence records of judgments against the intestate, for the purpose of showing his indebtedness when the sale was made, in order to avoid the sale on the ground of fraud against creditors.

Foster v. Nowlin, 4 Mo. 18.

If A. die in possession of property in one state, and B. remove the same to another state, he may be charged as executor de son tort in the latter state.

Foster v. Nowlin, 4 Mo. 18.

Mo. 1869. An action on an administration bond is governed by Gen.St.1865, c. 191, § 9, Rev.Code 1855, c. 103, art. 2, § 2, and not by section 10, and so has 10 years to run from the date of the accruing of the action.

Martin v. Knapp, 45 Mo. 48.

Mo.App. 1888. In view of the statutory system of administering decedents' estates in force in this state, there cannot be an executor de son tort, in so far as to enable a single creditor of the decedent to maintain an action of trover against him, and thereby appropriate the whole assets to the payment of such creditor's debt.

Rozelle v. Harmon, 29 Mo.App. 560.

For Cross-References or Descriptive Words
see
DESCRIPTIVE-WORD INDEX

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